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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 418

SOUTHERN PACIFIC COMPANY,
a corporation,
Petitioner,

vs.

OVE E. ERICKSEN.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

SOUTHERN PACIFIC COMPANY,
a corporation,
Petitioner,

vs.

OVE E. ERICKSEN.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

Southern Pacific Company, a corporation, prays that a writ of certiorari issue to review the judgment rendered by the Supreme Court of the State of California on July 31, 1952, in the case in that court entitled and numbered: "OVE E. ERICKSEN, Plaintiff and Respondent, v. SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Appellant" S. F. No. 18478. That judgment affirmed a judgment of the Superior Court of California for San Francisco, in favor of plaintiff Ericksen and against defendant and petitioner

Southern Pacific Company in an action for damages for personal injuries brought under the Federal Employers' Liability Act.

PROCEEDINGS IN THIS CASE

After judgment for plaintiff in the trial court (R 5, 6) agreeably to the laws of California, the defendant appealed to the District Court of Appeal of the State of California, First Appellate District. (R 9) On August 8, 1951, that court filed its opinion and judgment affirming the judgment below. (R 107 ff) It denied a rehearing. (R 118) Southern Pacific Company, the unsuccessful appellant, thereupon, agreeably to the California practice, petitioned the Supreme Court of California to transfer the cause to the Supreme Court and hear and determine it (R 118ff). The petition was granted. (R 145) The effect of this order was to vacate the judgment of the District Court of Appeal and transfer the appeal to the Supreme Court for determination *de novo.* (*Martin v. Howe,* 190 Cal. 187, 211 P 453; *Estate of Stierlen,* 199 Cal. 140, 248 P 509; *Knouse v. Nimocks,* 8 C2d 482, 66 P2d 438.)

On July 31, 1952, by a 4 to 3 decision, the Supreme Court affirmed the judgment of the trial court. (R 145ff) A petition for rehearing was denied August 28, 1952 (R 158).

The question of the legal sufficiency of the evidence was appropriately raised in the trial court by a motion for a directed verdict, which was denied, (R 76) and by motion for judgment notwithstanding the verdict (R 6ff) which was denied (R 8) and was the matter considered and passed on by the Supreme Court of California (R 145ff).

OPINIONS BELOW

The opinion of the California District Court of Appeal rendered August 8, 1952, is at p. 107ff of the record. It is reported in 105 ACA[1] 1018 and 234 P2d 279.

The opinions of the Supreme Court of California appear in the record at p. 145ff and copies are appended hereto (App. A). The opinions are reported in 39 AC[2] 385, 246 P2d 642.

JURISDICTION

The judgment of the Supreme Court of California sought to be reviewed was rendered and filed on July 31, 1952. The jurisdiction of this Court is invoked under 28 USC §§1257(3) and 2101(c).

FEDERAL STATUTE INVOLVED

This action was brought and prosecuted under the Federal Employers' Liability Act as amended in 1939, Act of April 22, 1908, c. 149, 35 Stat. 65; Act of August 11, 1939, c. 685, 53 Stat. 1404; 45 USC §51ff.[3] A copy of the applicable provisions, as they appear in 45 USC, is appended hereto (App. B).

QUESTIONS PRESENTED

The following questions are presented by this petition:

1. Did the 1939 amendment of §1 of the Federal Employers' Liability Act enlarge the field of application of that

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1. Advance California Appellate Reports. Since, by transfer of the cause to the Supreme Court, the decision of the District Court of Appeal is vacated and becomes a nullity it will not be officially reported.

2. Advance California Reports. The opinions will be officially reported in Volume 39 of California Reports, Second Series (39 C2d).

3. The only section of the Act involved in the questions presented is §1.

statute to include an employee of a common carrier by railroad who was employed and acted solely as a lumber inspector inspecting lumber on the premises of the vendor before acceptance by and shipment to the railroad? Phrasing the question in the language of the statute, was "any part" of the duties of the employee "the furtherance of interstate or foreign commerce" or "in any way directly or closely and substantially, affect such commerce"? (45 USC §51 as amended.)

2. When the railroad employer is engaged solely in the local transaction of purchasing railroad ties for future use and having them inspected on the vendor's premises before acceptance and shipment does the Federal Employers' Liability Act apply to the employer? Is it then acting as a "common carrier by railroad" and if the employee is injured when he is inspecting the ties does the injury happen "while" the employer is "engaging in commerce between any of the several states"?

3. Was the Supreme Court of California correct in making the sole test of application of the Federal Employers' Liability Act as amended the ascertainment of whether the injured employee came within the language of the second paragraph of §1 of the Act?[4] Was it correct in holding "It is unnecessary to discuss the nature of the defendant employer's activities. When the employee's duties are shown to have had the required effect on interstate commerce he is 'deemed' to have been employed by a carrier engaged in that commerce"?

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4. This second paragraph (see App. B) was added by the amendment of 1939. The addition of this second paragraph was the only change made in §1 of the Act.

4. If the Federal Employers' Liability Act does apply then what is the nature and extent of the duty, if any, of the employer to the employee as to the condition of the premises **of a third person,** over which the employer has no control, and, if there is a duty, is there any evidence in this case to show any violation of the duty?

STATEMENT

The only witness to any matter touching the questions presented by this petition was the plaintiff Ericksen.[5] The facts as we state them are taken from his testimony or are matters stipulated to.

Ericksen had been a lumber inspector for Southern Pacific Company for about 30 years (R 13, 16, 22) inspecting lumber in various lumber yards in Oregon and Washington (R 19). The office out of which he worked was in Portland (R 19). When he was out on the job he worked alone and was his own boss (R 42, 59). For 3 or 4 months before the accident he had been working at Central Point, Oregon, (10) and the day before the accident and the day of the accident had been **on the premises of Cheney Lumber Company** (R 13, 23). The day before he inspected ties there (R 26) and was to inspect ties on the day of the accident.

The ties were piled by employees of Cheney Lumber Company (R 24). They handled them and turned them over so Ericksen could inspect (R 56, 57), he inspected and graded the ties, rejected those that did not meet the specifications, (R 22) and the Cheney men then loaded the accepted ties into freight cars (R 24). No ties could be loaded unless he passed them (R 24).

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5. The other 3 witnesses were doctors who testified to plaintiff's physical condition.

Ericksen said nothing as to the use to which the particular ties on the loading dock on the day of the accident would be put or where they would be shipped. Speaking of ties generally he testified that the biggest part of them were shipped out of Oregon; they were put in new tracks and used for replacements of old ties; some went to the creosote plant in Oakland but not all; it depends on how much of a hurry they are in for their ties; if they are short of ties they will put them in the track without being treated; they are loaded into the box car and it goes out to the road where they need it; it is shipped out and is unloaded along the railroad tracks and they put it in the track without being creosoted; some are used on main line and some are used for switching tracks. (R 25, 26, 27)

This is **all** that appears on the question of interstate commerce and application of the Federal Employers' Liability Act.[6]

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6. The complaint alleged that defendant was engaged in the business of a common carrier by railroad in interstate commerce in the State of California and other states; that defendant was a common carrier by railroad engaged in interstate commerce and plaintiff was employed by it in such interstate commerce and the injuries to plaintiff arose in the course of and while plaintiff and defendant were engaged in the conduct of such interstate commerce; that plaintiff was regularly employed by defendant as a lumber inspector. (R 1)

The answer stated that defendant "was engaged among other activities, in the business of a common carrier by railroad in interstate and intrastate commerce in the State of California and other states. On June 17, 1947, plaintiff was employed by defendant as a lumber inspector, inspecting lumber and lumber products to be purchased by defendant." **All the other averments of the complaint were denied** and, by consequence, it was denied that with respect to the plaintiff's activities plaintiff or defendant was engaged in interstate commerce or defendant was acting as a common carrier or by railroad or that plaintiff was injured while either of the parties were engaged in interstate commerce. (R 3, 4)

On the day of the accident switching was going on and a car was to be switched in. A load of ties was put on the loading dock. Ericksen thought he might as well inspect these while he had a chance and so, before loading began, and before there were any Cheney Lumber Company men there to turn the ties over for him he undertook to look at them. (R. 28) The ties were piled even with the dock or sticking over the dock a little (R 28). To look at the ends toward the track Ericksen stepped out toward the edge of the dock, leaned over and then, as he was straightening up, fell. At one point he testified he was "still off balance and something was under my foot, whether it was a pebble or a piece of wood or something, and that's what threw me off." (R 30) Again he said "it was something under the ball of my foot when I stepped back which I stepped on, either a pebble or **what it was I couldn't say.**" (R 41) At another point he testified that he either stepped on something or his ankle kind of gave way, one or the other, "Q. But you don't know? A. I'll never know. Q. Your ankle could have just given way? A. It could. Q. And that would have caused you to lose your balance? A. Yes." (R 39) In a written report of the accident he stated "stepped on piece of bark; lost balance" (R 63).

The **whole** record as to any notice to, or knowledge of, defendant of the conditions at the Cheney Lumber yard is the following:

> "Well, it's perhaps about five, five weeks or so before I fell off, I came very near falling off one day, and when I come into Portland and started to talk about the different mills and how they piled their lumber, and so forth and so on, and I suggested that it wasn't—they didn't leave enough room down at Central Point." (R 35, 36)

Defendant could not have been on notice or known that ties were always piled to the edge of the loading dock **because that was not the fact.**[7]

Ericksen at no time requested of Cheney Lumber Company or of any of its employees any change of conditions. (R 60) There had been no refusal.

REASONS FOR GRANTING THE WRIT

A. Interstate Commerce.

In 1906 Congress made "every common carrier" engaged in commerce in the District of Columbia or in any territory or in interstate or foreign commerce "liable to **any**[8] of its employees" injured as a result of its negligence. (34 Stat. 232, c. 3073.) On January 6, 1908, this Court held the statute unconstitutional in the States[9] upon the ground that the Act "being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of **any** of their employees, without qualification or restriction as to the business in which the carriers or their

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7. Ericksen testified that at times at least the ties were brought in on "fork lift trucks"; that he did not tell the fellow in the lift trucks to move them back from the edge **because "he can't get over to the edge,** because if they do with those carriers they will go over the edge of the dock. **They have to set them back from the edge.**" (R 55, 56, 60)

8. Throughout emphasis by use of bold face type is ours.

9. Congress has plenary power to legislate for the District of Columbia and for Territories. Here its power does not rest on the commerce clause. The provisions of the Act of 1906, as applied to the District of Columbia and the Territories, were held severable and valid. (*El Paso etc. Co. v. Gutierrez*, 215 US 87, 54 L ed. 106; *Santa Fe etc. Co. v. Friday*, 232 US 694, 58 L ed. 802; *Washington etc. Co. v. Downey*, 236 US 190, 59 L ed. 533.) Accordingly, it is in force in the District of Columbia and the Territories except to the extent that it has been superseded by the Federal Employers' Liability Act of 1908 or some other statute (*Phila. etc. R. Co. v. Schubert*, 224 US 603, 56 L ed. 911; *So. Ry. Co. v. Taylor*, 16 F2d 517 (Circ. Dist. Col.), cert. den. 273 US 767, 71 L ed. 882).

employees may be engaged at the time of the injury, of necessity includes subjects wholly outside the power of Congress to regulate commerce." (*Howard v. Ill. C. R. Co.* and *Brooks v. So. Pac. Co.*, 207 US 463, 52 L ed. 297.) Congress promptly enacted the Federal Employers' Liability Act of 1908[10] in which it carefully and deliberately restricted application of the Statute to employers and employees who were engaged in interstate commerce. It guarded the constitutionality of the statute by providing:

> "Every common carrier by railroad **while engaging** in commerce between any of the several states • • • shall be liable in damages to any person suffering injury **while** he is employed by **such** carrier **in such commerce** • • •."

With these limitations the constitutionality of the Statute was sustained (*Mondou v. New York etc. R. Co.*, 223 US 1, 56 L ed. 327) and a little later this Court pointed out that the restrictions of the Statute were such that Congress did not go to the limit of its power (*Ill. C. R. Co. v. Behrens*, 233 US 473, 58 L ed. 1051. See also *Carey v. N. Y. C. R. Co.*, 250 NY 345, 165 NE 805, and *McBain v. Northern P. Ry. Co.*, 52 Mont. 578, 160 P 654).

It was abundantly clear from the history and language of the statute that it did not apply to all of the activities of an employer some of whose activities were those of a common carrier by railroad in interstate commerce and did not apply to all the employees of an employer who was only a common carrier by railroad. (*Delaware etc. R. Co. v. Yurkonis*, 238 US 439, 59 L ed. 1397; *Raymond v. Chicago etc. Ry. Co.*, 243

10. The present statute. We are concerned with none of the amendments except that of 1939 to the first section.

US 43, 61 L ed. 583; *So. Pac. Co. v. Jensen,* 244 US 205, 61 L ed. 1086; *I. A. C. v. Davis,* 259 US 182, 66 L ed. 888; *Chicago etc. Ry. Co. v. Bolle,* 284 US 74, 76 L ed. 173; *Chicago etc. R. Co. v. Ind. Com'n,* 284 US 296, 76 L ed. 304; *N. Y. etc. R. Co. v. Bezue,* 284 US 415, 76 L ed. 370.) But where and how to draw the line? Two rules became established by the decisions of this Court:

1. Application of the Act should not turn on the nature of the general activity of the employer or the nature of the general employment of the employee but upon the nature of the activity in which they were engaged **at the very moment he was injured;** under the Act, "by its terms the true test is the nature of the work being done at the moment of injury." (*Ill. C. R. Co. v. Behrens,* above; *Chicago etc. R. Co. v. Harrington,* 241 US 177, 60 L ed. 941; *L. & N.R. Co. v. Parker,* 242 US 13, 61 L ed. 119; *Chicago etc. R. Co. v. Bolle,* above; *Erie R. Co. v. Welsh,* 242 US 303, 61 L ed. 319; *Shanks v. Delaware etc. R. Co.,* 239 US 556, 60 L ed. 436.)

2. The rule of the *Shanks Case* (*Shanks v. Delaware etc. R. Co.,* above) that the work, to make it interstate commerce within the meaning of the Act, must be interstate **transportation,** or work so closely related to it **as to be practically a part of it.** The rule and its rationale were stated by this Court in *I.A.C. v. Davis,* above:

> "The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement—indeed, are necessary to it; **but so are all attached to the railroad company**—official, clerical, or mechanical. **Against such a broad generalization of relation we, however,**

may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the **actual operation of the instrumentalities** for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate **transportation** or in work so **closely** related to it **as to be practically a part of it,** in order to displace state jurisdiction and make applicable the Federal act."

Compare *Chicago etc. Ry. Co. v. Bolle,* above,[11] and *N. Y. etc. R. Co. v. Bezue,* above.[12]

Under these rules there were large areas where the Act did not apply to railroad employees. But it did not follow that in these areas the employees were without remedy or

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11. "It will be observed that the word used in defining the test is '**transportation,**' not the word 'commerce.' **The two words were not regarded as interchangeable,** but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. **The business of a railroad is not to carry on commerce generally.** It is engaged in the **transportation** of persons and things in commerce; and hence the test of whether an employee at the time of his injury is engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it.

"Since the decision in the *Shanks Case,* the test there laid down has been steadily adhered to, and never intentionally departed from or otherwise stated."

12. "All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, machinists, and those who operate all manner of appliances **not directly or intimately concerned with interstate transportation as such,** or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act."

that their remedies were subject to what are now considered out-moded defenses of a fellow-servant doctrine, assumption of risk, or contributory negligence. The areas could be and were filled by state compensation statutes or similar schemes (*Boston & M. R. Co. v. Armburg,* 285 US 234, 76 L ed. 729; *I.A.C. v. Davis,* 259 US 182, 66 L ed. 888; *Shanks v. Delaware etc. R. Co.,* 239 US 556, 60 L ed. 436; *Gaulden v. So. Pac. Co.,* 78 F Supp. 651 (N.D. Calif.), affirmed for the reasons and on the grounds stated below 174 F2d 1022 (Circ. 9)). Still 30 years of experience under the act was thought to show that there were injustices and inequalities. This was pointed out in the Senate Report (see Appendix C hereto) on proposed amendments to the Act. Two classes of cases in particular were selected as classes of work to which the Act should apply, (a) work upon rolling equipment normally used in interstate commerce but withdrawn from service, where the Act had been held not to apply (*N.Y. etc. R. Co. v. Bezue,* above; *I.A.C. v. Davis,* above) and (b) handling the instrumentalities of transportation where the Act would or would not apply depending upon whether **at the moment of injury** the men were actually engaged with **interstate** equipment (*Ill. C. R. Co. v. Behrens,* above) and who, by consequence, might move in and out of the act several times during the course of a single shift. Accordingly, in 1939 section 1 of the Act was amended.

The section was not recast. The section as enacted in 1908 was re-enacted and a new paragraph was added. The significance of this is suggested below.

As originally introduced the proposed amendment defined the employees covered by the Act as those, any part

of whose duties was in furtherance of interstate commerce or "in **any way**" affected interstate commerce. In the process of enactment there was substituted for the words "in any way" affected the present and more restricted wording "in any way **directly or closely and substantially**" affected interstate commerce. (*Ermin v. Penn. R. Co.*, (1941) 36 F Supp. 936, 938 (E.D. N.Y.); *Moser v. U.P.R. Co.*, (1944) 65 Ida. 479, 147 P2d 336, 343.) This change in the course of enactment must be given its proper weight. (*United States v. St. Paul etc. Ry. Co.*, 247 US 310, 318, 62 L ed. 1130, 1134; *Fox v. Standard Oil Co.*, 294 US 87, 96, 79 L ed. 780, 787; *Helvering v. Wood*, 309 US 344, 348, 84 L ed. 796, 798; *Western U. T. Co. v. Lenroot*, 323 US 490, 509, 89 L ed. 414, 427.)

Before the 1939 amendment it was established that for the Act to apply **both the employee and the employer must meet the tests of the statute.** (a) The "employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it" (p. 11, above). (b) **The employer** must be a common carrier by railroad at the time **engaged as such in interstate commerce** with respect to the work of the employee (*So. Pac. Co. v. Jensen*, 244 US 205, 61 L ed. 1086; *Delaware etc. R. Co. v. Yurkonis*, 238 US 439, 59 L ed. 1397; *McCluskey v. Marysville & N. Ry. Co.*, 243 US 36, 61 L ed. 578; *Bay v. Merrill etc. Co.*, 243 US 40, 61 L ed. 580; *Raymond v. Chicago etc. Ry. Co.*, 243 US 43, 61 L ed. 583; *Shanks v. Delaware etc. R. Co.*, 239 US 556, 60 L ed. 436; *North Carolina R. Co. v. Zachary*, 232 US 248, 58 L ed. 591).

The 1939 amendment did not touch the second of these tests. It merely provided:

> "Any **employee** of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The amendment "merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee' to include certain persons not theretofore covered, because they were not directly engaged in interstate or foreign commerce" (*Desper v. Starved Rock Ferry Co.*, (1952) 342 US 187, 96 L ed. (Adv. Op. 150); *Baird v. N. Y. C. R. Co.*, (1949) 299 NY 213, 86 NE2d 567; *So. Pac. Co. v. I. A. C.*, (1948) 88 CA2d 569, 571, 199 P2d 364).

This Court has taken over only one case in which the issue of application of the Federal Employers' Liability Act as amended in 1939 was decided.[13] It has denied certiorari in 11 cases. In 7 it was held that the Federal act applied (3 denied an award of compensation under a state statute[14] and 4 affirmed judgments for the plaintiff under the Federal

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13. As this petition goes to print we are informed that a petition for certiorari was granted in *Penn. R. Co. v. O'Rourke*, October Term, 1951, No. 767, to review *O'Rourke v. Penn. R. Co.*, 194 F2d 612, (Circ. 2) in which the question is whether the Federal Employers' Liability Act or the Longshoremen and Harborworkers' Compensation Act applied. (See note 20 below.) There may be other petitions of which we are unaware.

14. *Albright v. Penn. R. Co.*, (1944) 183 Md. 421, 37 A2d 870, cert. den. 323 US 735, 89 L ed. 589; *Copley v. I.A.C.*, (1942) 19 C2d 287, 120 P2d 879, cert. den. 316 US 678, 86 L ed. 1752; *Trucco v. Erie R. Co.*, (1946) 353 Pa. 320, 45 A2d 20, cert. den. 328 US 843, 90 L ed. 1618.

statute[15]), 3 cases held that the Federal Employers' Liability Act did not apply (2 sustained awards under state compensation acts[16] and in 1 judgment was for the defendant upon the ground that the Longshoremen and Harborworkers' Compensation Act applied[17]), and 1 case reversed the judgment of the trial court and sent the case back for a new trial where the trial court had directed the jury that the Federal Employers' Liability Act applied and, on appeal, it was held that there was question of fact on this issue which must be submitted to the jury.[18] These cases will be classified and dealt with below in dealing with the other decisions.

It is believed that in view of (a) the cases which, to date, have considered the problem and in which opinions have been published, and (b) of cases now pending in which application of the Federal Employers' Liability Act is sought, it is an appropriate time for this Court to take over and decide the important federal question of substance not heretofore determined by this Court and in this case determined by a state court, and to pass on the important ques-

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15. *Atl. C. L. R. Co. v. Meeks*, (1947) 30 Tenn. App. 520, 208 SW2d 355, cert. den. 333 US 827, 92 L ed. 1112; *Maxie v. Gulf etc. Co.*, (1949) 356 Mo. 642, 202 SW2d 904, 358 Mo. 1100, 219 SW2d 322, cert. den. 338 US 823, 94 L ed. 499; *Pritt v. West Virginia N. R. Co.*, (1948) ..... WVa. ....., 51 SE2d 105, cert. den. 336 US 961, 93 L ed. 1113; *Riley v. West Virginia etc. Co.*, (1948) ..... WVa. ....., 51 SE2d 119, cert. den. 336 US 961, 92 L ed. 1113.

16. *Lawrence v. Rutland R. Co.*, (1942) 112 Vt. 523, 28 A2d 488, cert. den. 317 US 693, 87 L ed. 555; *Thomson v. Ind. Com'n.* (1942) 380 Ill. 386, 44 NE2d 19, cert. den. 318 US 755, 87 L ed. 1129.

17. *Gussie v. Penn. R. Co.*, (1949) 1 NJ Super. 293, 64 A2d 244, cert. den. 338 US 869, 94 L ed. 533. See note 20 below.

18. *Avance v. Thompson*, (1944) 320 Ill. App. 406, 51 NE2d 334, 387 Ill. 77, 55 NE2d 57, cert. den. 323 US 753, 89 L ed. 603.

tion of federal law involved which has not been, but should be, settled by this Court.

It is believed that this is an appropriate case to be taken over by this Court. The record is short. There is no conflict in the evidence. The facts are simple. The case is characteristic of a large class of cases. The decision below, in applying the act to a lumber inspector, goes beyond any of the cases heretofore decided (except, possibly, *Kettner v. Ind. Com'n*, (1951) 258 Wis. 615, 46 NW2d 833, and this case does no more than pose the question whether it was correctly decided). We believe that the question in this case was incorrectly decided and that the case represents an unwarranted extension of application of the federal statute into a field where its application can result only in injustices in the great majority of cases.

We propose briefly to review these suggestions in the order in which they are made.

So far as we are aware there are published opinions in 74[19] cases in which there was a question of application of the Federal Employers' Liability Act as amended in 1939. Opinions in 6 of the cases can be put to one side,—the question was whether the Federal Employers' Liability Act or the Longshoremen and Harborworkers' Compensation Act applied to a maritime injury of a railroad worker. Although

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19. This does not include any cases after August 11, 1939 where the accident happened before August 11, 1939 the effective date of the amendment, or any cases holding that the 1939 Amendment did not apply retroactively to accidents which happened before it went into effect.

The date of the accident does not appear in the opinion in *Mastrandrea v. Penn. R. Co.*, (1942) 132 F2d 318 (Circ. 3). An examination of papers in that case, sent to us by the Clerk of the Court of Appeals for the Third Circuit, shows it happened on February 24, 1939.

the 1939 amendment of the Federal Employers' Liability Act was considered the point is different from the one with which we are concerned.[20] Of the remaining 68 cases, 8 held that the Federal Employers' Liability Act did not apply (see note 24 below), 59 held that it did apply, and 1 that the question turned on a disputed matter of fact which should have been submitted to the jury (note 18 above). Most, but not all,

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20. *Nogueira v. N. Y. etc. R. Co.*, (1930) 281 US 128, 74 L ed. 754, held that the Longshoremen's and Harborworkers' Compensation Act (44 Stat. 1424, 33 USC §901ff) provided the exclusive remedy for a railroad employee moving freight by hand truck onto a freight car on a boat used to transport loaded freight cars upon navigable waters. This case was followed, its rule applied, and it was held that the Federal Employers' Liability Act did not apply to a railroad brakeman injured on a freight train ferry whose duty it was to set and release brakes and ride cars on and off the ferry and injured while cars were being moved off the ferry in *Buren v. So. Pac. Co.*, (1931) 50 F2d 407 (Circ. 9), cert. den. 284 US 638, 76 L ed. 543. After the 1939 amendment of the Federal Employers' Liability Act the same result was reached in *Job v. Erie R. Co.*, (1948) 79 F Supp. 698 (S.D.N.Y.), *Gussie v. Penn. R. Co.*, (1949) 1 NJ Super. 293, 64 A2d 244, cert. den. 338 US 869, 94 L ed. 533, and *Byrd v. N.Y.C. System*, (1949) 6 NJ Super. 568, 70 A2d 97. Then *Zientek v. Reading Co.*, (1950) 93 F Supp. 875 (E.D.Penn.) held that the rule had been changed by the 1939 amendment of the Federal Employers' Liability Act. The holding and reasoning in this case was disapproved, and the court refused to follow it, in *Rist v. Pittsburgh etc. Co.*, (1951) 104 F Supp. 29 (N.D.Ohio) and *O'Rourke v. Penn. R. Co.*, (1951) 99 F Supp. 506 (E.D.N.Y.).

In the last case the Court of Appeals for the Second Circuit reversed the District Court and held that the Federal Employers' Liability Act did apply to a brakeman, one judge dissenting, (*O'Rourke v. Penn. R. Co.*, (1952) 194 F2d 612 (Circ. 2)). We are informed that a petition for certiorari to review this last decision was granted on Oct. 13, 1952. The Court of Appeals for the Second Circuit did not go upon the ground that the rule had been changed by the 1939 amendment. Speaking of the 1939 amendment to the FELA and its effect, it held the amendment to be unimportant and said that the problem "is not one of interstate commerce, but of maritime employment, as the term is used in the" Longshoremen's Act, tried to distinguish the *Nogueira Case*, said it was not controlling and refused to follow *Buren v. So. Pac. Co.*, above.

of these cases are collected in 10 ALR2d 1279 and the annotations to that note.

Reviewing the cases generally some conclusions emerge as to which there seems to be little disagreement. The 1939 amendment has broadened the area of application of the statute. It was designed to remove uncertainty as to its application to activity which was classically that of railroading.[21] But all difficulties have not been removed. The amendment's "meaning is certainly not free from doubt" (*So. Pac. Co. v. I. A. C.*, (1942) 19 C2d 271, 275, 120 P2d 880; *Ernhart v. Elgin etc. Ry. Co.*, (1950) 405 Ill. 577, 92 NE2d 96, 101[22]). Nevertheless, there are guides and aids.

The amendment of 1939 does not make the Act as broad as the Act of 1906 which was held unconstitutional (see p.

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21. In *Gaulden v. So. Pac. Co.*, 78 F Supp. 651, 656 (N.D. Calif.) affirmed for the reasons and on the grounds stated below (174 F2d 1022 (Circ. 9)), the court said: "The remedial and humanitarian purposes of the Employers' Liability Act in no way compel an interpretation of a contract in favor of an employment or agency relationship. It is not amiss to point out that plaintiff is not without remedy for his injuries. The benefits of the Workmen's Compensation Act of California are available to him. It is not for the courts to extend the coverage of the Liability Act into new fields. **During the 40 year life of the Employers' Liability Act, Congress, while liberalizing its benefits, has not seen fit to extend the scope of the statute beyond railroading in its true sense.**"

22. "A consideration of all the cases serves greatly to emphasize that no standard of interpretation has been reached. • • • We agree with the court in *Southern Pacific Railroad Company v. Industrial Accident Com'n*, 19 C2d 271, 120 P2d 880, that the meaning of the 1939 amendment is certainly not free from doubt."

And in the opinion in the *Ericksen Case*, sought to be reviewed, it was said that none of the decisions on which we relied, "suggest a test of any greater precision or ease of application to the present case than the words of the statute itself." It is believed the comment is not justified. But it indicates the attitude of some courts. They are satisfied to announce all conclusions without making use of the criteria which are available.

8 above (*Taylor v. Lumaghi Coal Co.*, 252 Mo. 1212, 181 SW2d 536, 539).[23] It does not apply to **all** employees of a common carrier by railroad engaged in interstate commerce, as is amply demonstrated by those cases which refuse to apply it.[24] There is no suggestion to the contrary

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23. And the Supreme Court of California in the case at bar says that the decision in the *Howard and Brooks Cases*, p. 9 above, casts no doubt on the constitutionality of the Act because the statute there involved failed to require that the activities of either the employee or the employer affect interstate commerce, and such requirement is clearly a part of the present Act as to the duties of the employee.

24. 3 of the 8 cases which refused to apply the statute did so because, while it was shown that the employer was a common carrier by railroad engaged in interstate commerce, it was not made to appear the employee had any connection with the interstate aspects of the business (*Shoenfelt v. Penn. R. Co.*, (1947) 69 F Supp. 728 (S.D.N.Y.); *Hallaway v. Thompson*, (1950) 148 Tex. 471, 226 SW 816; *Harper v. Ill. C. R. Co.*, (1946) 66 F Supp. 751 (W.D.Ky.)). *Holl v. So. Pac. Co.*, (1947) 71 F Supp. 21 (N.D. Calif.) refused to apply the statute to a clerk in the freight claims department. *Moser v. U. P. R. Co.*, (1944) 65 Ida. 479, 147 P2d 336, refused to apply the act to one engaged in the construction of new track in line with the distinction between maintenance and new construction established by *Pedersen v. Delaware etc. R. Co.*, 229 US 146, 57 L ed. 1125; *Raymond v. Chicago etc. Ry. Co.*, 243 US 43, 61 L ed. 583; *N. Y. C. R. Co. v. White*, 243 US 188, 61 L ed. 667; *Minn. etc. R. Co. v. Nash*, 242 US 617, 61 L ed. 531. *Thomson v. Ind. Com'n*, (1942) 380 Ill. 386, 44 NE2d 19, cert. den. 318 US 755, 87 L ed. 1129, declined to apply the statute to a railroad policeman where it did not appear that his duties, at the time, had any direct or substantial relation to the movement of interstate shipments. *Lawrence v. Rutland R. Co.*, (1942) 112 Vt. 523, 28 A2d 488, cert. den. 317 US 693, 87 L ed. 555, held the act did not apply to one removing weeds from a right of way not for railroad purposes but to comply with a state statute under which, if the railroad did not clear the weeds, the town could and could then recover the costs from the railroad. *Boyleston v. So. Ry. Co.*, (1947) ..... SC ....., 44 SE2d 537, declined to apply the federal statute to a laborer who loaded and unloaded. The *Boyleston Case* seems doubtful and to rest on the desire of the court to see that an injured workman received some compensation in circumstances where recovery on the basis of negligence under the federal act may have been questionable. (Cf. note 51 below.)

in any of the cases which held that the Act did apply. Granted that the coverage of the Act had been broadened and the line of demarcation moved a line still must be drawn (*So. Pac. Co. v. I. A. C.*, (1948) 88 C2d 569, 199 P2d 364, citing *Holl v. So. Pac. Co.*, footnote 24. Cf. the Davis Case, quoted pp. 10, 11 above).

In fixing the line the course of the legislation may be looked to and consideration given to the changed and restricted wording of the amendment as enacted compared to the amendment as originally introduced (see pp. 12, 13 above). The situation as it existed at the time the amendment was adopted may be considered to determine "the mischief to be corrected and the end to be attained." (*Warner v. Goltra*, 293 US 155, 158, 79 L ed. 254, 257.) Assistance may be gotten from the report of the committee which handled the legislation in the Senate (*United States v. St. Paul etc. Ry. Co.*, 274 US 310, 318, 62 L ed. 1130, 1134; *United States v. C. I. O.*, 335 US 106, 112, 92 L ed. 1849, 1856) and, indeed, the courts have done this with the committee report (App. C) dealing with this legislation (e.g. *So. Pac. Co. v. I. A. C.*, (1942) 19 C2d 271, 275, 120 P2d 880; *Holl v. So. Pac. Co.*, (1947) above; *Ernhart v. Elgin etc. Co.*, (1950) 405 Ill. 577, 92 NE2d 96, 101; *Scarborough v. Penn. R. Co.*, (1944) 154 Pa. Super. 129, 35 A2d 603; *Rainwater v. Chicago etc. Co.*, (1945) 207 La. 681, 21 S2d 872; *Baird v. N. Y. C. R. Co.*, (1949) 299 NY 213, 86 NE2d 567). That report, and the cases (and see also *Lewis v. I. A. C.*, (1942) 19 C2d 284, 120 P2d 886; *Prader v. Penn. R. Co.*, (1943) 113 Ind. App. 518, 49 NE2d 387) make it clear that the primary object of the amendment was to remove the so-called "moment of injury" or "pin-point" rule and to remove the

inequality existing between workmen working side by side on different pieces of equipment one of whom might be within the Act and the other without the Act depending on the indifferent circumstance, probably unknown to the workmen, having nothing to do with the risks incurred by them in doing the work, that one piece of equipment was definitely assigned to interstate commerce while the other was unassigned or temporarily withdrawn.[25]

Turning from these considerations to the amendment itself it is significant that Congress, presumably aware of the construction put upon §1 of the Act by the decisions of this Court[26], a presumption put beyond all doubt by reference in the committee report to the rule of the *Shanks Case* (cf. *Overstreet v. North Shore Corp.*, 318 US 125, 132, 87

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25. The committee report picked out in particular (a) the work of switching where the men were "constantly shifting from one class of service to another" but where, under the *Behrens Case* (p. 9 above), the moment of injury rule was applied and the FELA did not apply unless at the very moment of injury interstate equipment was being handled and (b) employees working "upon cars or engines which have been temporarily withdrawn from interstate commerce." See, noticing these two classes, and particularly the second, the *Baird Case* cited just above in the body. For other cases noticing that the act should apply to men whose work normally was in interstate commerce but who, at the moment, were temporarily divorced from that, *Mo. Pac. R. Co. v. Fisher*, (1944) 206 Ark. 705, 177 SW2d 725 and *St. Louis etc. Ry. Co. v. Wacaster*, (1947) 210 Ark. 1080, 199 SW2d 948.

26. Congress is presumed to know the settled construction of a statute. *Overstreet v. North Shore Corp.*, 318 US 125, 131, 132, 87 L ed. 656, 662; *United States v. C.I.O.*, 335 US 106, 112, 92 L ed. 1849, 1856; *Francis v. So. Pac. Co.*, 333 US 445, 449, 92 L ed. 798, 803; *United States v. So. Buffalo Ry. Co.*, 333 US 771, 774, 92 L ed. 1077, 1081; *Com'r v. Munter*, 331 US 210, 215, 91 L ed. 1441, 1445; *Walling v. Halliburton etc. Co.*, 331 US 17, 25, 91 L ed. 1312, 1318; *N.L.R.B. v. Gullett Gin Co.*, 340 US 361, 366, 95 L ed. 337, 343; *United States v. Williams*, 341 US 70, 81, 95 L ed. 758, 266; *Heald v. District of Columbia*, 254 US 20, 22, 65 L ed. 106, 111 and note to that case in 65 L ed.

L ed. 656, 662), readopted without change in wording the first section and gave legislative approval to the judicial interpretation which has been placed upon its language (see cases in note 26 and *McFeely v. Com'r*, 296 US 102, 110, 80 L ed. 83, 89). The 1939 amendment was only by adding a second paragraph to the first section. The significance of this has been commented on (*Holl v. So. Pac. Co.*, (1947) 71 F Supp. 21 (N.D. Cal.); *Ernhart v. Elgin etc. Co.*, (1949) 337 Ill. App. 56, 84 NE2d 868, 871). **Nothing new is said of employers. There is no new definition of interstate commerce,**—it is still interstate transportation or work so closely related to it as to be practically a part of it.[27] The only thing that was done was to give new definition to the term "employee" by extending the Act to employees whose duties were less directly connected with interstate transportation than duties which were practically a part of it (see p. 14 above). Substituting, in the paragraph added to §1 of the Act by the 1939 amendments, for the words "interstate commerce" the approved definition of those words (see pp. 10, 11 above), the paragraph added by that amendment has this meaning:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate **transportation** or work so closely related to it as to be practically a part of it; or shall, in any way directly or closely and substantially, affect such inter-

27. If it is proper to say that Congress used the term "interstate commerce" in the Fair Labor Standards Act with the interpretation placed upon it by decisions under the Federal Employers' Liability Act,—and this is the holding of *Overstreet v. North Shore Corp.*, 318 US 125, 131, 87 L ed. 656, 662,—then in using the term in an amendment to the Federal Employers' Liability Act itself, *a fortiori* the same must be true.

state **transportation** or work so closely related to it as to be practically a part of it as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce."

Upon examination of the precise holdings in the cases which have applied the Act, as amended, there is not a great deal that is startling; nothing which warrants the extension attempted in the case at bar.

Of the 60[28] cases which applied the Act as amended 18 were cases of men clearing and keeping open for traffic, maintaining, rehabilitating and repairing the actual highway of interstate commerce itself, — tracks, switches, bridges, etc.[29] Under *Pedersen v. Delaware etc. R. Co.*, 229

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28. This includes the *Avance Case* note 18 above and note 34 below.

29. *Copley v. I.A.C.*, (1942) 19 C2d 287, 120 P2d 879, cert. den. 316 US 678, 86 L.ed. 1752; *Prader v. Penn. R. Co.*, (1943) 113 Ind. App. 518, 49 NE2d 387; *Piggue v. Baldwin*, (1942) 154 Kan. 708, 121 P2d 183; *Patsaw v. Kansas etc. Ry. Co.*, (1944) 56 F Supp. 897 (W.D.La.); *Atl. C. L. R. Co. v. Meeks*, (1947) 30 Tenn. App. 520, 208 SW2d 355, cert. den. 333 US 827, 92 L.ed. 1112; *Gulf etc. Co. v. Waterhouse*, (1949) (Tex. Civ. App.), 223 SW2d 654; *Riley v. West Virginia etc. Co.*, (1948) ..... WVa. ....., 51 SE2d 119, cert. den. 336 US 961, 92 L.ed. 1113; *Bailey v. Cent. Vt. R. Co.*, (1943) 113 Vt. 433, 35 A2d 365; *Dillard v. Thompson*, (1945) 5 F.R.D. 26; *Mo. Pac. R. Co. v. Fisher*, (1944) 206 Ark. 705, 177 SW2d 725; *St. Louis etc. Ry. Co. v. Wacaster*, (1947) 210 Ark. 1080, 199 SW2d 948; *Agostino v. Penn. R. Co.*, (1943) 50 F Supp. 726 (E.D.N.Y.); *Skanks v. U. P. R. Co.*, (1942) 155 Kan. 584, 127 P2d 431; *Rainwater v. Chicago etc. Co.*, (1945) 207 La. 681, 21 S2d 872; *Brainard v. Atchison etc. Co.*, (1950) 87 F Supp. 921 (D.Kan.); *Harris v. Mo. Pac. R. Co.*, (1944) 158 Kan. 679, 149 P2d 342; *Armstrong v. Mo. etc. Co.*, (1950) (Tex. Civ. App.) 233 SW2d 942; *Walden v. Chicago etc. Ry. Co.*, (1952) 411 Ill. 378, 104 NE2d 240.

Few of these cases call for comment. We briefly note the things in them which made them of any interest and different from the ordinary run of this type of case. In the *Prader Case* a section hand was hurt when he was sent away from the job to get a rule book. In the *Patsaw Case* he was injured while going to the tool

US 146, 57 L ed. 1125, these cases would have fallen under the Act before the 1939 amendment.[30]

Five of the cases involved work on permanent structures, permanently committed to the general business of the railroad, both interstate and intrastate.[31] This Court had held

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house for tools. In the *Meeks Case* he was injured in a bunk car provided by the employer and though he was not working he was subject to call. In the *Wacaster Case* a short section of main line was being double tracked and in the *Agostino Case* new rail was being laid to shorten the line. In both cases the work was treated as maintenance of main line. In the *Skanks, Rainwater* and *Brainard Cases* materials were being prepared for repair work to which they had been committed. In the *Brainard Case* the work was that of assembling switches and frogs which were usually stock-piled but the Court was careful to point out that the stock-pile had been exhausted and that at the time the employee was working on switches and frogs which would be shipped for immediate use. In the *Harris* and *Armstrong Cases* the work was that of cleaning up and policing generally the railroad premises.

30. In addition to the *Pedersen Case* (alteration and repair of bridges and tracks,—taking bolts or rivets to bridge to be used that night or next day on bridge) see *N. Y. C. R. Co. v. Winfield*, 244 US 147, 61 L ed. 1045 (section laborer tamping ties); *So. Ry. Co. v. Puckett*, 244 US 571, 61 L ed. 1321 (carrying blocks to be used in clearing wreck and re-railing cars); *N. Y. C. R. Co. v. Porter*, 249 US 168, 63 L ed. 536 (shoveling snow between track and platform); *Phila. etc. R. Co. v. Smith*, 250 US 101, 63 L ed. 869 (kitchen help in outfit car of maintenance of way crew); *Brown's Adm'r v. Norfolk & W. Ry. Co.*, 12 F2d 319, aff'd 20 F2d 133 (Circ. 4) cert. den. 275 US 540, 72 L ed. 414 (collecting fuel for kitchen car of maintenance of way outfit in course of movement to location); *Grank Trunk Ry. Co. v. Knapp*, 233 Fed. 950 (Circ. 6) (carpenter on work train injured in collision while on way to repair bridge); *Kansas City So. Ry. Co. v. Leinen*, 144 Ark. 454, 243 SW 1, cert. den. 254 US 648, 65 L ed. 456 (member of train crew hauling ballast to be dumped for immediate use on main line).

31. *Jordan v. B. & O. R. Co.*, (1950) ..... WVa. ....., 62 SE2d 806; *Great Northern Ry. Co. v. Ind. Com'n*, (1944) 245 Wis. 375, 14 NW2d 152; *Scarborough v. Penn. R. Co.*, (1944) 154 Pa. Super. 129, 35 A2d 603; *Zimmermann v. Scandrett*, (1944) 57 F Supp. 799 (E.D. Wis.); *Wills v. Terminal R. Ass'n*, (1947) ..... Mo. App. ....., 205 SW2d 942. In the *Scarborough Case* the plaintiff was doing a temporary job in installing a light in

in *Erie R. Co. v. Collins*, 253 US 77, 64 L ed. 790, and *Erie R. Co. v. Szary*, 253 US 86, 64 L ed. 794, that the Act, before the 1939 amendment, applied in such a situation. It then reversed itself in *Chicago etc. R. Co. v. Ind. Com'n*, 284 US 296, 76 L ed. 304, and *Chicago etc. R. Co. v. Bolle*, 284 US 74, 76 L ed. 173. The cases, before the 1939 amendment, were borderline cases, to say the least. Cases now holding that the broadened area of application of the Act includes such hardly call for comment.[32]

Sixteen of the cases involved members of crews handling rolling equipment,—10 involved switching crews and 6 involved road crews. In 2 of the switching crew cases[33] and 4 of the road crew cases[34] the Federal Employers' Liability Act would have applied before the 1939 amendment because the men were actually handling interstate equip-

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the station building. His regular work was that of a signal maintainer and, of course, part of his duties were maintenance of the main line system.

32. The cases in the last two classes mentioned are to be distinguished from new construction. *Moser v. U. P. R. Co.*, (1944) 65 Ida. 479, 147 P2d 336 held the Act, as amended, did not apply to new construction. This case has never been criticized, not even in the majority opinion in the case at bar.

33. *McCall v. Pitcairn*, (1942) 232 Iowa 867, 6 NW2d 415; *Pritt v. West Virginia N. R. Co.*, (1948) ..... WVa. ....., 51 SE2d 105, cert. den. 336 US 961, 93 L ed. 1113.

34. *Avance v. Thompson*, (1944) 320 Ill. App. 406, 51 NE2d 334, 387 Ill. 77, 55 NE2d 57, cert. den. 323 US 753, 89 L ed. 603 (sent back for a new trial to submit to the jury the question whether a specified car was an interstate car being handled by the crew); *L. & N. R. Co. v. Stephens*, (1944) 298 Ky. 328, 182 SW2d 447 (handling interstate empties); *Griffith v. Gardner*, (1949) 358 Mo. 859, 217 SW2d 519 (claimed from time to time handled interstate shipments and records for the day in question destroyed; held that an inference unfavorable to the railroad arose); *Beam v. B. & O. R. Co.*, (1945) 77 Oh. St. 419, 68 NE2d 159.

ment.[35] In the remaining cases[36] the crews handled interstate and intrastate cars indiscriminately and as a regular part of their duties. By its terms, since **part** of their duties was in interstate commerce, the Act applied. This class of case is one of the two classes of cases specially mentioned in the Senate Committee report (App. C).

Seventeen of the cases were of employees engaged in servicing the equipment used to carry interstate shipments. In 2 of the cases[37] the locomotive was assigned to interstate work and, of course, before the 1939 amendment the Act would have applied.[38] But before the amendment it had been held (although the holdings are not all harmonious)

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35. In *Ernhart v. Elgin etc. Co.*, 405 Ill. 577, 92 NE2d 96, the court said that in 3 other cases, *L. & N. R. Co. v. Potts, Taylor v. Lumaghi Coal Co.*, and *Ford v. L. & N. R. Co.*, all cited in footnote 36 just below, interstate equipment was being handled at the moment of injury but we have not included these 3 cases because we do not so read them.

36. Switching crews: *So. Pac. Co. v. I. A. C.*, (1942) 19 C2d 281, 120 P2d 887; *Lewis v. I. A. C.*, (1942) 19 C2d 284, 120 P2d 886; *Ernhart v. Elgin etc. Co.*, (1949, 1950) 337 Ill. App. 56, 84 NE2d 868, 405 Ill. 577, 92 NE2d 96; *L. & N. R. Co. v. Potts*, (1942) 178 Tenn. 425, 158 SW2d 729; *Ermin v. Penn. R. Co.*, (1941) 36 F Supp. 936 (E.D.N.Y.); *Kach v. Monessen etc. Co.*, (1945) 151 F2d 400 (Circ. 3); *Rogers v. N. Y. etc. R. Co.*, (1946) 328 Ill. App. 123, 65 NE2d 243; *Murphy v. B. & M. R.*, (1946) 319 Mass. 413, 65 NE2d 923 (interstate commerce "agreed or substantially admitted").

Road crews: *Taylor v. Lumaghi Coal Co.*, (1944) 252 Mo. 1212, 181 SW2d 536; *Ford v. L. & N. R. Co.*, (1946) 355 Mo. 362, 196 SW2d 163.

37. *Williams v. Chicago etc. Ry. Co.*, (1942) 155 Kan. 813, 130 P2d 596, and *Wright v. N. Y. C. R. Co.*, (1942) 263 App. Div. 461, 33 NYS2d 531, aff'd 288 NY 719, 43 NE2d 97, cert. den. 317 US 668, 87 L ed. 537.

38. *N. Y. C. R. Co. v. Marcone*, 281 US 345, 74 L ed. 892; *Chicago etc. R. Co. v. Bower*, 241 US 470, 60 L ed. 1107; *B. & O. R. Co. v. Kast*, 299 Fed. 419 (Circ. 6), cert. den. 266 US 613, 69 L ed. 468.

that if equipment was withdrawn from service for repairs, etc., the Act did not apply. The remaining 15 cases in this class[39], by reason of the 1939 amendment, now apply the Act. These cases represent an extension of the Act but an extension well within its terms and to the second class of case picked out and specified in the Senate Committee report on this Act (App. C.). It cannot be said of these cases that there is any unwarranted extension,—certainly part of the duties of these employees is the furtherance of interstate transportation. Rolling equipment committed to the general business of the railroad and used indiscriminately in interstate and intrastate commerce can hardly be distinguished from the highway of commerce itself, upon which they roll, and permanent structures.

One case was of a flagman whose duty it was to warn of the approach of trains.[40] Before the 1939 amendment such

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39. *So. Pac. Co. v. I. A. C.*, (1942) 19 C2d 271, 120 P2d 880 (probably the leading case); *So. Pac. Co. v. I. A. C.*, (1942) 19 C2d 283, 120 P2d 888; *McFadden v. Penn. R. Co.*, (1943) 130 NJL 601, 34 A2d 221; *Maxie v. Gulf etc. Co.*, (1949) 356 Mo. 642, 202 SW2d 904, 358 Mo. 1100, 219 SW2d 322, cert. den. 338 US 823, 94 L ed. 499; *So. Pac. Co. v. I. A. C.*, (1942) 19 C2d 283, 120 P2d 888; *So. Pac. Co. v. I. A. C.*, (1948) 88 CA2d 569, 199 P2d 364; *Trucco v. Erie R. Co.*, (1946) 353 Pa. 320, 45 A2d 20, cert. den. 328 US 843, 90 L ed. 1618; *Edwards v. B. & O. R. Co.*, (1942) 131 F2d 366 (Circ. 7); *Shelton v. Thomson*, (1945) 148 F2d 1 (Circ. 7,—crane operator in a shop using crane to lift wheels treated as "one who is engaged with others in the process of repairing cars"); *Skidmore v. B. & O. R. Co.*, (1948) 167 F2d 54 (Circ. 2); *Bretzky v. Lehigh V. R. Co.*, (1946) 156 F2d 594 (Circ. 2); *Baird v. N. Y. C. R. Co.*, (1949) 299 NY 213, 86 NE2d 567; *Wheeler v. Mo. etc. Co.*, (1947) ..... Mo. App. ....., 205 SW2d 906; *Williams v. Chicago etc. Co.*, (1942) 155 Kan. 813, 130 P2d 596; *Kordic v. Penn. R. Co.*, (1942) 46 Pa. D. & C. 607; *So. Pac. Co. v. Libbey*, (1952) ..... F2d ..... (Circ. 9, Oct. 1, 1952).

40. *B. & O. R. Co. v. Rodeheaver*, (1951) ..... Md. ....., 81 A2d 63. The court said the Act would have applied before the 1939 amendment.

men were held to be engaged in interstate commerce and to fall under the Act.[41]

There are only 3 other cases. One was of a yard employee employed to check seals on interstate cars and guard interstate shipments before delivery to the consignee.[42] Another concerned a messenger carrying railroad mail and interstate waybills.[43] Before the 1939 amendment clerks checking interstate cars and handling the papers directly concerned with their movements fell under the Act.[44] The remaining case is *Kettner v. Ind. Com'n*, (1951) 258 Wis. 615, 46 NW 2d 833, which denied an award of compensation under the state act for the death of a freight solicitor. This case goes beyond any of the other cases and is wrong.

Recently there have been other attempts to extend the area of application of the federal statute to employees not covered by the Act before the 1939 amendment and whose work does not fall within, and is not analogous to the work in, any of the above classes of case and is not "railroading" in its true sense (see note 21 above) but is characteristically ordinary industrial work most usually carried on separately

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41. *Philadelphia & R. R. Co. v. DiDonato*, 256 US 327, 65 L ed. 955; *So. Pac. Co. v. I. A. C.*, 174 Cal. 8, 161 Pac. 1139; *So. Pac. Co. v. I. A. C.*, 174 Cal. 16, 161 Pac. 1142 (cited in the *Rodeheaver Case*); *Mastrandrea v. Penn. R. Co.*, (1942) 132 F2d 318 (Circ. 3) (see note 19 above).

42. *Albright v. Penn. R. Co.*, (1944) 183 Md. 421, 37 A2d 870, cert. den. 323 US 735, 89 L ed. 589. The contrary result was reached in *Thomson v. Ind. Com'n*, (1942) 380 Ill. 386, 44 NE2d 19, cert. den. 318 US 755, 87 L ed. 1129, but all that was shown was that a guard was ejecting a trespasser from railroad premises. It was not shown that the guard's duties had any special relation to interstate commerce.

43. *Bowers v. Wabash R. Co.*, (1952—Mo. App.) 246 SW2d 535.

44. *St. Louis etc. Ry. Co. v. Seale*, 229 US 156, 57 L ed. 1129; *Pecos etc. Ry. Co. v. Rosenbloom*, 240 US 439, 60 L ed. 730.

from railroading, by independent organizations even when railroads use the product. The only possible basis for application of the federal act is that the railroad elected to carry on this activity itself rather than rely on others as is usually done. Referring only to cases which have come to our attention, there have been attempts to extend the application of the act to the following cases: Men employed in a railroad car shop and employed exclusively in the construction of **new** cars;[45] men employed in a wheel foundry manufacturing freight car wheels;[46] men employed in a sawmill;[47] men employed in the construction of a new classification yard.[48] Other examples of employments essential to the continued operation of a railroad but which are remote

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45. *Gilco v. S. P. Co.*, California Superior Court, San Francisco No. 411036 (now on appeal); *Eelk v. S. P. Co.*, California Superior Court, Sacramento No. 87156 (pending and undetermined); *S. P. Co. v. Lee*, before the California Industrial Accident Commission, claim No. 52-S.F. 140-360 and *Lee v. S. P. Co.*, *California Superior* Court, San Francisco No. 417503, two proceedings concerning the same man, both pending and undetermined.

46. *Aranda v. S. P. Co.*, California Superior Court, Sacramento No. 87250 (still pending).

47. *Storch v. S. P. Co.*, California Superior Court, San Francisco No. 409884, where a judgment for the plaintiff was satisfied for practical reasons and cited here only as a concrete example.

48. *Moreno v. S. P. Co.*, California Superior Court, Sacramento No. 88793, which resulted in a judgment for the defendant as matter of law because no negligence was shown and an example illustrating the proposition that wide extension of the act,—"liberal construction",—does not always operate for the benefit of the injured man; *Garza v. S. P. Co.*, California Superior Court, San Francisco No. 416460, pending.

In these cases under *Moser v. U. P. R. Co.*, (1944) 65 Ida. 479, 147 P2d 336, it should be held that the Act, as amended, does not apply. In the *Moreno Case* the court refused to so hold and denied relief on the ground the Act applied. If the judgment becomes final it precludes any claim under the state Act. The *Garza Case* has not been tried.

from transportation will readily suggest themselves:[49] Designers of equipment and other employees of the engineering department, purchasers of supplies and chemists and others testing supplies furnished, employees of the commissary department other than dining car employees and other men out on the road, employees of the land department, employees of the law department, employees of the claims department, employees engaged in publicity, public relations and advertising, building employees such as elevator operators, janitors, etc., employed in office buildings, clerks in ticket offices, accounting department employees, workers in mines, quarries and oil fields, store department employees, etc. This Court will not determine these cases as a purely academic proposition but they are suggested to indicate the impact of the case at bar and that the assistance of this Court is necessary in the determination of where the line will be drawn.

Is the case at bar an appropriate one for consideration of the problem? First: it extends application of the Act far beyond any of the decided cases with the exception, possibly, of the *Kettner Case*. Second: production and purchase of materials to have them generally available for future use to be determined by someone other than the man purchasing the materials or inspecting them before accepted, is essentially local in nature (*Treasurer of Indiana v. Wood Preserving Corp.*, 313 US 62, 85 L ed. 1188).[50] The

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49. Compare the *Davis Case*, p. 10 above and the language quoted in notes 11 and 12 above.

50. Sale and delivery of ties to a railroad which, upon acceptance by the railroad, were forthwith loaded on railroad cars for shipment to another state for treatment. Compare *So. Pac. Co. v. Gallagher*, 306 US 167, 83 L ed. 586; *P. T. & T. Co. v. Gallagher*,

employer is not engaged in transportation. It is not acting as a railroad or a common carrier. At best it is preparing to do so. Third: Ericksen belonged to a class of employees whose work is performed away from the premises of the railroad company and on the premises of third persons. The risk of injury to which he normally would be exposed was risk of injury from activity not of the employer and other of its employees, but of third persons. It is no kindness to such men, who normally could not recover on the ground of negligence of the employer, to hold that the Federal Employers' Liability Act applies and relieves the employer of liability for compensation under state compensation acts where the right to compensation does not depend upon fault of the employer.[51] In addition, if the injury is the result of negligence these men will have their actions against the wrong-doing third prson.

It is hardly necessary to add that before the 1939 amendment the Act would not have applied to a lumber inspector or other employee engaged in manufacturing or procuring supplies which, at the time, were not assigned to any specific or immediate use but were only for general future use of the railroad (a use to be fixed and determined by some other

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306 US 182, 83 L ed. 595; *Edelman v. Boeing Air Transport*, 289 US 249, 77 L ed. 1155; *Nashville etc. R. Co. v. Wallace*, 288 US 249, 77 L ed. 730. These are tax cases but they do point the essential local nature of the activity.

51. For examples of cases where there was no remedy at all because the railroad employee was killed or injured off the premises of the employer and by the act of a third person see *Bowers v. Wabash R. Co.*, (1952—Mo. App.) 246 SW2d 535, *Kettner v. Ind. Com'n*, (1951) 258 Wis. 615, 46 NW2d 833, and *Prader v. Penn. R. Co.*, (1943) 113 Ind. App. 518, 49 NE2d 387. The court seems clearly right in holding that the federal act applied in the *Bowers* and *Prader Cases* but the results, nevertheless, sound a warning against undue extension of application of the statute.

employee), upon the ground that neither the railroad[52] nor the employee[53] fell within the Act.

B. Negligence.

If the Federal Employers' Liability Act does not apply, we do not reach the question of the duty of the employer to the employee and its claimed violation.

If the Federal Act does apply, then that the question in this case was close, to say the least, is indicated by the fact

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52. A corporation may be a common carrier by railroad in interstate commerce and also engaged in other activities as to which it is not within the Act (*So. Pac. Co. v. Jensen*, 244 US 205, 61 L ed. 1086; *So. Ry. Co. v. Taylor*, 16 F2d 517 (Circ. Dist. Col.) cert. den. 273 US 767, 71 L ed. 882). Even when its activities are directed to the ultimate objective of transportation by rail the activities still may not be such as to bring it within the Act; it may be "engaged in intrastate commerce, or in what is not commerce at all" (*Shanks v. Delaware etc. R. Co.*, 239 US 556, 557, 60 L ed. 436, 438). We are restricting ourselves to examples of procuring supplies. Operation of a coal mine to procure coal to be used in interstate engines is not interstate commerce (*Delaware etc. R. Co. v. Yurkonis*, 238 US 439, 59 L ed. 1397) nor is handling and moving coal to a point of storage for future use (*Chicago etc. R. Co. v. Harrington*, 241 US 177, 60 L ed. 941; *Lehigh V. R. Co. v. Barlow*, 244 US 183, 61 L ed. 1070) or procuring and placing rails for future use (*Hudson etc. M. R. Co. v. Iorio*, 239 Fed. 855 (Circ. 2); *De Santis v. N. Y. etc. R. Co.*, 74 F2d 261 (Circ. 2)) or blasting rock to be used to repair a trestle carrying transcontinental trains (*Conway v. So. Pac. Co.*, 67 Utah 464, 248 Pac. 115).

53. See the cases in footnote 52 and compare the following where it was held that the employee was not engaged in interstate commerce: picking up ties left by the manufacturers of the ties (*Alexander v. Gt. N. R. Co.*, 51 Mont. 572, 154 Pac. 914); stacking ties for future use (*Mo. etc. Ry. Co. v. Watson*, (Tex. Civ. App.) 195 SW 1177); peeling bark off ties (*Karras v. Chicago etc. Ry. Co.*, 165 Wis. 578, 162 NW 923); cutting ties in a railroad yard in a portable sawmill (*Buynofsky v. Lehigh V. R. Co.*, 228 NY 249, 126 NE 714); stacking ties for future use on a section where the ties had been sent at the request of the section foreman (*Arizona Eastern R. Co. v. Head*, 26 Ariz. 145, 222 Pac. 1041); work on the electric power supply for a tie treating plant (*Shurtliff v. O. S. L. R. Co.*, 66 Utah 101, 241 Pac. 1058).

that on this issue the Supreme Court of California split four to three. It is believed that the question is an important one which should be, but which has not been, decided by this Court.

There have been cases, of course, where railroad employees were injured by conduct or conditions for which someone other than the railroad was primarily responsible and where recovery was sought against the railroad employer because, so it was claimed, the injury or death also resulted in part from negligence of the employer. They are cases where the employer was actively prosecuting its own business of railroading, had made the place its own place of business, and had some control in the premises other than through the injured employee himself. The typical cases are those of switching on the premises of an industry or switching on a railroad track immediately next to a building or loading dock of an industry. But we are aware of no case involving injury to a railroad employee on the premises of a third person where the whole activity there conducted was the business of a third person, typically the situation in the case of a freight solicitor, purchasing agent procuring supplies or an inspector inspecting materials ordered for delivery to the railroad.[54] The explanation for this want of decision is readily at hand. Before 1939 the Federal Employers' Liability Act did not apply to such employees and it is only very recently that claim has been made that the Act as amended in 1939 applied.

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54. Compare, however, *Lasagna v. McCarthy*, 111 Utah 269, 177 P2d 734, cert. den. 332 US 829, 92 L ed. 403, railroad inspector working in a Navy train yard where blue flags were not used. Recovery was denied.

Here if the Act does apply the railroad should not be charged with negligence. There is no claim that it had any notice of the real cause of the injury,—the presence of a piece of bark or a rock or the mere turning of Ericksen's ankle. The only notice of any kind that it had was indefinite talk "about the different mills and how they piled their lumber" and the statement that "they" (unidentified) "don't leave enough room down at Central Point" without specification of where, how or in what connection "they" didn't leave enough room. But if it be assumed that the defendant had notice of the way ties were piled on the day of the accident, it still remains that no case was made. Plaintiff was his own boss. He did not have to inspect as he did. He could wait until the Cheney men turned the ties over for him. He was entirely in control of his own movements and even if he elected to inspect as he did, and the defendant knew this, there was nothing inherently dangerous.[55] He was fully aware of the situation and it was one from which he could protect himself.

Mere danger alone will not support a finding of negligence.[56] Having an employee encounter those minor risks

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55. With deference, some of the argumentative comments in the majority opinion of the Supreme Court of California, go far beyond the record and substitute for the test of exercise of reasonable care one requiring anticipation and prevention of every conceivable risk and depriving the employer of any right to assume that its employees are reasonable intelligent adults and will protect themselves from the every-day risks of normal life.

56. "No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with ice and snow. Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. * * * Under the circumstances, it cannot rea-

of injury known to the employee, from which he can protect himself and which everyone must face in the course of daily life, has never been held sufficient to sustain a recovery.[57] Certainly the risk that respondent would so conduct himself that he would lose his balance and fall in this case was no greater than exactly the same risk in the case of trainmen going along the top of moving freight cars and going from car to car or a trainman riding on the footboard of a moving locomotive. In these cases this Court has held that, as matter of law, there was no liability (*Reynolds v. Atl. C. L. R. Co.*, 336 US 207, 93 L ed. 618; *Moore v. Chesapeake & Ohio Ry. Co.*, 340 US 573, 95 L ed. 547). The dangers Ericksen faced were far less than those switchmen face getting on and off moving freight cars during switching, a universal custom and method of work. It has never been suggested that requiring men to do this without more would support a finding of negligence.

We do not enlarge upon this and argue it in full. We understand the function of this petition to be to expose the question, not to resolve it.

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sonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her. * * * As negligence on the part of the petitioner is essential, we need not consider it contingent in respect of assumption of risk and negligence on the part of respondent." (*Mo. Pac. R. Co. v. Aeby*, 275 US 426, 430, 72 L ed. 351, 354.)

57. Cf. *Walsh v. Turner etc. Ass'n*, 223 Mass. 386, 111 NE 889; *Lasagna v. McCarthy*, note 54 above; *Small v. Ralston-Purina Co.*, (Mo. App.) 202 SW2d 533; *Emerson v. Chicago etc. Ry.*, 191 Iowa 1386, 182 NW 376; *Stone v. Chicago etc. Co.*, 176 Minn. 104, 222 NW 641; *Cross v. B. & M. R. R.*, 223 Mass. 144, 111 NE 676; *So. Ry. Co. v. Carr*, 153 Fed. 106 (Circ. 4); *Nance v. Atchison etc. Co.*, 360 Mo. 980, 232 SW2d 547; *New Orleans etc. R. Co. v. Penton*, 135 Miss. 571, 100 So. 521; *Hardie v. New York etc. Corp.*, 9 F2d 545 (Circ. 2).

CONCLUSION

For the foregoing reasons it is prayed that this petition for certiorari be granted.

Respectfully submitted,

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October 24, 1952.

(Appendices follow)

APPENDIX A

[S. F. No. 18478. In Bank. July 31, 1952.]

OVE E. ERICKSEN, *Respondent,*

v.

SOUTHERN PACIFIC COMPANY (a Corporation), *Appellant.*

SHENK, J. The defendant Southern Pacific Company appeals from a judgment on a verdict awarding the plaintiff Ove E. Ericksen $18,000 damages for personal injuries in an action under the Federal Employers' Liability Act (45 U.S.C.A. §51) for failure to provide the plaintiff with a safe place to work.

The plaintiff was employed by the defendant railroad company as a lumber inspector. It was his duty to inspect lumber on the premises of various lumber companies in Washington and Oregon and accept or reject it for shipment to the defendant. Railroad ties which he inspected would be shipped to various states. Some would be used for the building of new tracks and some for the repair of old. Some would be first sent to California for creosoting; others would be immediately used in an untreated state.

On June 17, 1947, the plaintiff was inspecting ties on the loading dock of an Oregon lumber company. The ties that he approved were being loaded in defendant's freight car standing alongside the dock. The ties being inspected were so piled that the ends of some were even with the edge of the dock while others extended beyond it. The plaintiff stood on the dock beside the pile. He then leaned over the edge in order to inspect the ends, standing on his right foot, holding his right hand against the pile, with his left foot in midair.

He attempted to return to an upright position. While still off balance he set his left foot on the dock, touching some foreign object on the dock, possibly a pebble or piece of bark. His foot twisted and he fell, injuring his ankle.

The plaintiff testified that on other docks it was customary to keep the lumber away from the edge of the dock so that it could be readily checked. He further declared that he had almost fallen in making a previous inspection at this dock and had complained to his superior that not enough room was left at this particular location.

The applicability of the Federal Employers' Liability Act is brought into question. It provides:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (45 U.S.C.A. §51.)

It is unnecessary to discuss the nature of the defendant employer's activities. When the employee's duties are

shown to have had the required effect on interstate commerce he is "deemed" to have been employed by a carrier engaged in that commerce. The decision in *Howard v. Illinois C. R. Co.* and *Brooks v. Southern Pac. Co.*, 207 U.S. 463 [28 S. Ct. 141, 52 L. Ed. 297], casts no doubt on the constitutionality of such a rule. A similar statute was there held unconstitutional because it failed to require that the activities of either the employee or the employer affect interstate commerce. Such a requirement is clearly a part of the present statute as to the duties of the employee. This rule is designed, in part, to eliminate the necessity of determining whether an employee was engaged in interstate commerce at the moment of his injury. (*Southern Pac. Co. v. Industrial Acc. Com.*, 19 Cal. 2d 271 [120 P.2d 880].) But there is no indication that this was intended to be its sole effect.

The defendant contends that the act does not apply to the plaintiff because he is not a "railroader" exposed to the risks peculiar to railroading. The act furnishes a broader definition of those eligible to its benefits. It is made applicable to any employee whose duties further interstate commerce "or in any way directly or closely and substantially" affect such commerce. (45 U.S.C.A. §51.)

No decision relied upon by the defendant which has excluded an employee from coverage under the act in its present form deals with the question whether one performing the particular type of work done by the plaintiff falls within this definition. None suggests a test of any greater precision or ease of application to the present case than the words of the statute itself. In *Holl v. Southern Pac. Co.*, 71 F. Supp. 21, 24, employees who have been held covered by

the act were distinguished from those not entitled to its protection on the ground that ". . . each was furthering, i.e., promoting, or helping along present or future interstate commerce." In *Thomson v. Industrial Com.,* 380 Ill. 386, 393 [44 N.E.2d 19], the court similarly did no more than rephrase the words of the statute by saying that ". . . the test must be whether the activity in which the employee is engaged at the time of the accident, directly or closely and substantially affects interstate commerce." (See, also, *Lawrence v. Rutland R. Co.,* 112 Vt. 523, 526 [28 A.2d 488, 143 A.L.R. 476].)

It has been held that work on new tracks not yet in service is not covered by the act (*Moser v. Union Pac. R. Co.,* 65 Idaho 479 [147 P.2d 336, 153 A.L.R. 341]). The ties inspected by the plaintiff were not destined solely for such a use. Some were immediately transported across state lines and placed in tracks carrying interstate commerce, others were placed in such tracks after being taken to another state for creosoting, and the plaintiff himself crossed state lines in the performance of his services. It is reasonable to conclude that his duties satisfy the statutory requirement that they be in furtherance of interstate commerce.

It is argued on behalf of the defendant that negligence on its part was not established. It may be assumed that the jury could have concluded that the premises were unsafe only because of the presence of a foreign object on the dock and that the exercise of reasonable care did not require the defendant to prevent the existence of such a condition. That conclusion is not compelled as a matter of law. The question was one for the jury to determine.

Under the evidence the jury was entitled to conclude that the plaintiff was required to perform the duties of a tie inspector in a place where the defendant knew that there was danger of a fall because of the inconvenient location of the ties; that if the defendant had been exercising reasonable care to provide the plaintiff with a safe place to work it would not have required him to work there; that the inconvenient location of the ties was the cause of the plaintiff's injury since it forced him to assume an awkward off-balance position likely to result in a fall; and that the defendant therefore breached his duty to the plaintiff to furnish a safe place in which to work.

The plaintiff's knowledge of the unsafe nature of the premises does not relieve the defendant of liability. Since 1939 the defense of assumption of risk has been barred under the act. (45 U.S.C.A. §54.)* No subsequent decision has been cited which as a matter of law relieves an employer from liability for injuries due to dangers known to the employer simply because those dangers were also known to the employee.

The defendant asserts that since it did not own the premises it had no control over them and is therefore not liable for the injury sustained. The case of *Lang v. Lilley*

*45 U.S.C.A. §54. "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

& Thurston Co., 20 Cal. App. 223, 230 [128 P. 1028], is relied on. There it was said that, "The principle underlying the decisions relating to the duty of the employer to furnish a safe place in which the employee is put to work is, that the employer cannot be justly charged with negligence as to matters over which he has no control." (See, also *Thompson v. Atchison, T. & S. F. Ry. Co.*, 96 Cal. App. 2d 974, 977 [217 P. 2d 45].) It is argued that lack of direct control of the premises freed the defendant from responsibility no matter how unsafe it knows a particular location to be so long as its employees are aware of the danger.

The defendant's argument is answered by *Terminal R. Assn. of St. Louis v. Fitzjohn*, 165 F. 2d 473, 476-477. In that case the defendant employer had furnished a switching crew which was operating a third party's switch engine on that party's premises over tracks constructed, maintained, and owned by that party. The premises were unsafe because, as the plaintiff switching crew foreman knew, light standards attached to a cement ramp wall were so close to a track that there was insufficient clearance to permit a trainman to ride the side ladder of a freight car past that point. This lack of clearance resulted in injury to the plaintiff as he rode by while clinging to the side of a car. The court affirmed a judgment for the plaintiff and held that the absence of ownership or control of the premises by the employer did not absolve it from liability for their unsafe condition.

No distinction may be drawn between the present problem and the Terminal case on the ground that there the employer had taken over control of the third party's premises for the conduct of the employer's business or that the third

party furnished the instrumentalities. In either case did the employer by virtue of the task it required the employee to perform acquire control over that portion of the premises which made them an unsafe place in which to work. There is no indication that the Terminal Railroad Association had control over the location of the cement wall and light standards. The plaintiff here could not avoid the dangerous situation. He was required by the employer to work on or near the stock piles which constituted the dangerous condition.

The question therefore is whether the defendant is liable under the act which it knowingly required the plaintiff to work on unsafe premises of a third party and the employee also knew of the danger. State court decisions in applying common law principles are not controlling in the presence of a clear and plain duty under the act. It may be assumed that the common law nonliability doctrine in the absence of direct control applies where the employer has no notice or knowledge of unsafety or danger. But a conclusion of nonliability under the act where the employer requires the employee to work on premises known by the employer to be unsafe would amount to disapproval of the authorities which have recognized liability in such cases. No exception is made when the employee also knows of the unsafe condition but has no alternative except to work in the place of danger. The benefits of the act are not to be withheld in contravention of the plain intent of the act and contrary to its application in other cases. To do so would be to permit employers, otherwise subject to the act, with impunity to require the employees to work in places of known danger, so long as the unsafe premises are not under the employer's

direct control. In cases of known dangerous premises belonging to the third party, the absence of direct control does not absolve the defendant from liability under the act.

It is contended that the verdict is excessive in the light of alleged contributory negligence and because of asserted passion and prejudice on the part of the jury. The act provides that while contributory negligence is not a bar to recovery, awards must be diminished in proportion to the contributory negligence of the plaintiff. (45 U.S.C.A. §53.) Reappraisal of the amount of the verdict on the basis of this provision may not be made inasmuch as it was not established as a matter of law that the plaintiff was guilty of contributory negligence. It was for the jury to determine whether the plaintiff's manner of inspecting ties constituted negligence on his part.

In other respects the facts do not indicate that the verdict was excessive. The plaintiff's loss of wages during the estimated period of disability was shown to be approximately $3,000. The defendant argues that the remaining $15,000 represents compensation for pain and suffering and this is an unreasonable appraisal of a partial disability due to the limitation of the lateral motion in the ankle of a 64-year-old man whose life expectancy was estimated to be approximately 14 years. The injury consisted of a crushing fracture of the heel bone. A closed reduction with pin traction was performed in June, 1947, a week after the accident. The plaintiff remained in bed in traction for over a month. He left the hospital for several weeks in August returning five times in the following six months and spending a total of 20 days in the hospital. On returning to work in March he experienced "throbbing pain night and day" and was forced

to use a cane. In November, 1948, his ankle became so sore that he was unable to work for a month and he again received hospital treatment. In March, 1950, a triple arthrodesis was performed to relieve the pain from which he had been suffering for two years. The three joints beneath the astragalus were fused into a single joint by the operation, destroying the side motion of the foot. There is a 25 per cent limitation on the up and down motion of the foot, and a 50 per cent limitation in turning the foot inward and outward. It was estimated at the time of the trial that the plaintiff would be disabled for about six months after this operation. Although the operation may eliminate the pain, the evidence shows that the plaintiff will have difficulty in walking an uneven ground and will have to wear special shoes.

The claim that the verdict was excessive was passed upon and rejected by the trial court on the motion for a new trial. The amount of damages fixed by the jury and thereafter approved by the trial court will not be disturbed on appeal unless the evidence shows that the award is so disproportionate to any reasonable limit of compensation as to indicate that it was the result of passion, prejudice, or corruption on the part of the triers of the facts. (*Drotleff v. Renshaw*, 34 Cal.2d 176, 180 [208 P.2d 969].) There is no such showing.

The judgment is affirmed.

GIBSON, C. J., CARTER, J., and TRAYNOR, J., concurred.

EDMONDS, J.—The affirmance of the judgment in favor of Ericksen is based upon the assumption that he was injured upon unsafe premises provided by Southern Pacific

Company. This conclusion can be reached only by misinterpreting evidence which is virtually without conflict. Moreover, the decision improperly expands the scope of the Federal Employers' Liabilty Act by imposing liability without fault when the employee is assigned to duties upon the premises of a third party. This construction of the statute is not justified by its terms and is directly contrary to all of the decisions of the federal courts.

The most favorable inference for Ericksen which can be drawn from the evidence is that Southern Pacific required him to go upon another's premises after being notified that ties had been placed thereon in a dangerous manner in the past. The record does not show that the premises were dangerous, nor that the injury resulted from any defect in the loading dock. The evidence is undisputed that Cheney Lumber Company, not Southern Pacific, provided Ericksen with the place to work and exercised absolute control over its employees who placed the ties on the loading dock. The jury could have found from the evidence that Ericksen's injuries were caused by the negligent operation of the premises, but any wrongful conduct was that of the lumber company or its agents, not of Southern Pacific.

It is now said that the negligence of the lumber company, which Southern Pacific could do nothing to avoid, constitutes a breach of Southern Pacific's duty to Ericksen. But there is no holding that Southern Pacific was negligent and that its negligence was the cause of Ericksen's injury and the record would support no such conclusion. Under these circumstances, the only way in which the judgment could be affirmed is by applying the act as if it were a compensation

statute imposing liability without fault and making the employer the insurer of its employee's safety.

Under the rules stated by the majority, the railroad would be responsible in damages to its employee for an accident upon a public thoroughfare caused by a negligent automobile driver if the employee were engaged in his employer's business. This is said to be the "plain intent of the act" which imposes liability for injury "resulting in whole or in part from the *negligence* of any of the officers, agents, or employees *of such carrier,* or by reason of any defect, or insufficiency, *due to its negligence,* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (45 U.S.C.A. §51, emphasis added.)

In proceedings under the statute, "the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the federal courts." (*Chesapeake & Ohio Ry. Co. v. Kuhn,* 284 U.S. 44, 46-47 [52 S.Ct. 45, 76 L.Ed. 157]; *Graham v. Atchison, T. & S. F. Ry. Co.,* 176 F.2d 819, 824; *Anderson v. Atchison, T. & S. F. Ry. Co.,* 31 Cal.2d 117, 121-122 [187 P.2d 729].) "What constitutes negligence for the statute's purposes is a federal question, . . . Federal decisional law formulating and applying the concept governs." (*Urie v. Thompson,* 337 U.S. 163, 174 [69 S.Ct. 1018, 93 L.Ed. 1282]; *Chicago M. & St. P. Ry. Co. v. Coogan,* 271 U.S. 472, 474 [46 S.Ct. 564, 70 L.Ed. 1041].)

The act does not make the employer an absolute insurer against personal injuries suffered by its employees, but imposes liability only for negligence. (*Wilkerson v. McCarthy,* 336 U.S. 53, 61 [69 S.Ct. 413, 93 L.Ed. 497]; *Wetherbee v. Elgin, J. & E. Ry. Co.,* 191 F2d 302, 306; *Blunk v. Atchison,*

T. & S. F. Ry. Co., 97 Cal. App. 2d 229, 234 [217 P.2d 494].) "The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end." (*Baltimore & O. S. W. R. Co. v. Carroll*, 280 U.S. 491, 496 [50 S.Ct. 182, 74 L.Ed. 566].) Under the act, the duty which rests upon the employer is the common law duty of exercising reasonable care having regard to the circumstances and fault or negligence may not be inferred from the mere fact that the employee was injured. (*Missouri P. R. Co. v. Aeby*, 275 U.S. 426, 430 [48 S.Ct. 177, 72 L.Ed. 351]; *Thompson v. Atchison, T. & S. F. Ry. Co.*, 96 Cal. App. 2d 974, 977 [217 P.2d 45].) "The plaintiff cannot recover in the absence of negligence on the part of defendant." (*Toledo, St. L. & W. R. Co. v. Allen*, 276 U.S. 165, 168-169 [48 S.Ct. 215, 72 L.Ed. 513].)

As the court said in *McGivern v. Northern Pac. Ry. Co.*, 132 F2d 213, 217, "danger in a particular phase of an employment does not necessarily imply negligence . . . 'no employment is free from danger.' The defect to form the basis for a cause of action must be one which implies negligence on the part of the employer, or those for whose acts he is answerable." The present decision completely disregards these well settled rules of the federal courts.

At common law, "[t]he master's duty as to working conditions does not extend to the condition of premises not in his control, nor to the conduct of third persons with whom the servants are to be brought into contact during the course of the work, except that he has a duty to disclose dangerous conditions of which he should know." (Rest., Agency, §504; *Bosarge v. Gaines*, 93 F.2d 800, 801; *Roche*

v. Llewellyn Iron Works Co., 140 Cal. 563, 569-570 [74 P. 147]; *Lang v. Lilley & Thurston Co.*, 20 Cal. App. 223, 230 [128 P. 1028].) The element of control required by the common law for the imposition of liability upon the employer for injuries to an employee occurring upon the premises of a third party has been carried into the act. It provides liability only for negligence of the employer's "officers, agents, or employees" or for defects in "its" property and equipment due to "its negligence."

The Senate Judiciary Committee report upon the 1939 amendment to the act which abolished the defense of assumption of risk under the statute stated: "In justice, the master ought to be held liable for *injuries attributable to conditions under his control* when they are not such as a reasonable man ought to maintain in the circumstances." (Report of Senate Committee on Judiciary, 76th Cong., 1st Sess., Rept. No. 661, p. 4, emphasis added.) The committee's interpretation of the act has been adopted by the Supreme Court of the United States. (*Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 [63 S. Ct. 444, 87 L.Ed. 610, 143 A.L.R. 967].) In *Wilkerson v. McCarthy*, supra, the court said: "And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,' . . ." The language of section 54 of the act, there being considered, is identical to that of section 51 in requiring that the negligence be that "of the officers, agents, or employees of such carrier."

Although speaking vaguely of "the authorities which have recognized liability in such cases," the majority of the court have cited no decision applying the act which has abrogated

the common law rules of negligence. No such case can be found. For the imposition of liability without fault reliance is placed upon *Terminal R. Assn. of St. Louis v. Fitzjohn,* 165 F.2d 473, 476-477, which, upon its facts, is clearly distinguishable from Ericksen's situation. There, the employer had taken over the instrumentalities of a third party to perform the railroad's functions. The control of the ordnance plant was in the government, but the facilities used in the switching procedure were under the control of the railroad. The injury to the employee occurred because a railroad car, under the control of the employer, was pulled past a place known to it to be dangerous while the employee was in a position where he might be injured. Although the employer did not construct the premises nor control the location of the wall and light standards, it controlled the use of the instrumentality which caused the injury. In the present case, however, the employer had no control over either the premises or the operation of the instrumentality causing the injury.

In the Terminal case the court said that "the fact that the premises where plaintiff was sent to work did not belong to and were not under the control of defendant did not absolve defendant from liability for their unsafe condition." Although this very broad language appears to support the decision in favor of Ericksen, it is directly contrary to the interpretation placed upon the act by the Supreme Court of the United States, whose decisions upon this question are controlling. In addition, the statement was entirely unnecessary to the decision.

It has long been the rule that "where a railroad company permits an obstruction, of which it has actual or construc-

tive knowledge to remain, on, over or near its tracks, and by reason of such obstruction its servant is injured, the company is liable, although the obstruction belongs to it, or is under the control of a third person." (*Sprickerhoff v. Baltimore & Ohio R. Co.*, 323 Ill. App. 340, 346 [55 N.E.2d 532]; *Boston & M. R. R. v. Brown*, 218 F. 625, 627.) Where obstructions exist on, over or near the tracks, it is the duty of the railroad toward its employees to give sufficient warning by means of telltales or other devices. (See, generally, annotation in 79 A.L.R. 236.) Even though the obstruction is owned and controlled by a third party, "[i]f the passage beneath it was not reasonably safe under all of the circumstances, the railroad might still be negligent in continuing to permit the passage of trains beneath it while in such condition." (*Boston & M. R. R. v. Brown*, supra; *Humphfres v. Western Pac. Ry. Co.*, 173 Cal. 428, 433 [160 P. 415].) The reason for the rule is obvious. Although the railroad may not control the obstruction, it controls the operation of its trains, which may be diverted to avoid the obstruction. The negligence does not consist of permitting the continuance of the obstruction, but lies in the operation of a train controlled by the railroad past a point which is unsafe because of the obstruction.

The rule is not different where the railroad is operating trains upon the tracks of another. In such case, the track and other instrumentalities which it is using are "its" for the purposes of the act as much as if it were operating the road under lease. (*Campbell v. Canadian N. Ry. Co.*, 124 Minn. 245, 250 [144 N.W. 772].) The sources of the employer's title to the instrumentalities in its control and use are of no concern to the employee and, "as between them,

they are the tools of the master, and his is liable to the servant for their defects." (*Smith v. Memphis & L. R. R. Co.*, 18 F. 304, 310.) Although the defect is not on property owned by the employer, if it is using the property in the conduct of its business and if, by exercising ordinary care, it could have remedied or repaired the condition, or warned the employee thereof, it is liable for failure to do so. (*Brum v. Wabash Ry. Co.*, 335 Mo. 876, 882-883 [74 S.W.2d 556].) But in every case where liability has been imposed upon the employer for injury caused to the employee by a defect in the property or instrumentalities of another, the premises or tools have been under the control of the employer and in use by it in the conduct of its business. Such was the situation in the Terminal case. However, here the employer had no control of the premises or instrumentalities, which were used by Cheney Lumber Company exclusively in the conduct of its business.

The Terminal decision relies upon *Albert Miller & Co. v. Wilkins*, 209 F. 582 [126 C.C.A. 404]; *American Machinery Co. v. Ferry*, 141 Ky. 372 [132 S.W. 546]; and *Grand Trunk R. Co. v. Tennant*, 66 F. 922 [14 C.C.A. 190]. In each of them, the defendant employer was in control of the instrumentalities being used in the performance of the work, although the work was being done upon the premises of a third party. In addition, the American Machinery and Grand Trunk cases also involved the duty of warning the employee of a danger upon the premises of the third party of which he did not know. The latter question is not here involved. The reliance of the Terminal case upon decisions stating the rule applicable when the employer controls the instrumentality being used, and its conformity with the

general rule relating to obstructions near railroad tracks, clearly show that it is not authority in determining the rights of the parties where the employer has no control of the premises or instrumentalities.

For these reason I would reverse the judgment and the order denying the motion for judgment notwithstanding the verdict and direct the trial court to enter its order granting said motion.

SCHAUER, J., and SPENCE, J., concurred.

APPENDIX B

45 USC §51: Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as

such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

APPENDIX C

Excerpts from U. S. Senate Report on the 1939 Amendment to the Federal Employers' Liability Act

REPORT

[To accompany S. 1708]

In pursuance of an order of reference made by the Senate on the 6th day of March 1939, the Committee on the Judiciary have conducted hearings on Senate bill No. 1708, to amend section 51 of chapter 2, title 45, of the Code of Laws of the United States of America, and in the light of the hearings have adopted a substitute therefor and report the substitute with the recommendation that it be passed. The substitute, in which the proposed amendments to the existing law are in italics, is as follows:

A BILL To amend the Employers' Liability Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1, 4, and 6, chapter 149 (35 Stat. 65, Act of April 22, 1908), are hereby amended so as to read as follows:

> "Section 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and

Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is empoyed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parent; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended.

* * * * * * *"

OBJECTIVES OF THE BILL

It is the aim of the bill to amend the Employers' Liability Act in three particulars:

1. It broadens and clarifies the law in its application to employees who may be killed or injured while

in the service of a railroad company engaged in interstate or foreign commerce.

2. It abrogates the defense of assumption of risk in cases where injury or death is caused by the negligence of a carrier and makes the doctrine of comparative negligence applicable instead.

3. It prohibits the promulgation or enforcement of rules which penalize railroad employees for giving information concerning accidents to the injured person or his representative.

Amendment to Section 1

This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, "in transportation or work so closely related to it as to be practically a part of it" (*Shanks v. D., L. & W. R. R.*, 239 U.S. 556).

In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in

interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route to an interstate movement.

As a result of the uncertainty which exists in borderline cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 418

SOUTHERN PACIFIC COMPANY (a corporation),
Petitioner,
vs.
OVE E. ERICKSEN,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No.

SOUTHERN PACIFIC COMPANY (a corporation),
Petitioner,
vs.
OVE E. ERICKSEN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the California District Court of Appeal rendered August 8, 1951 is at page 107ff of the record. It is reported in 105 A.C.A. 1018 and 234 P. (2d) 279.

The opinions of the Supreme Court of California appear in the record at page 145ff. The opinions are reported in 39 A.C. (2d) 385, 246 P. (2d) 642.

JURISDICTION.

The judgment of the Supreme Court sought to be reviewed was rendered and filed on July 31, 1952. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1257 (3) and § 2101 (c).

STATUTE INVOLVED.

The action was brought and prosecuted under the Federal Employers' Liability Act as amended in 1939, Act of April 22, 1908, c. 149, 35 Stat. 65; Act of August 11, 1939, c. 685, 53 Stat. 1404; 45 U.S.C. § 51ff. A copy of the applicable provisions, as they appear in 45 U.S.C. is appended hereto. (App. A.)

QUESTIONS PRESENTED.

The petitioner has raised four questions which we choose to restate, as the language of the questions, as stated by petitioner, creates inferences which we feel are not supported by the record. Furthermore, they are not in accord with the jury's verdict. The questions restated are:

(1) Was "any part" of the employee's duties, as shown by the record in this case, in "the furtherance of interstate or foreign commerce" or did it "in any way directly or closely and substantially, affect such commerce"?

(2) Was the railroad, as reflected by the record in this case, acting as a "common carrier by railroad"

and was it "engaging in commerce between any of the several states"?

(3) Was the Supreme Court of California correct in making the sole test of application of the Federal Employers' Liability Act as amended the ascertainment of whether the injured employee came within the language of the second paragraph of § 1 of the Act? Was it correct in holding "It is unnecessary to discuss the nature of the defendant employer's activities. When the employee's duties are shown to have had the required effect on interstate commerce he is 'deemed' to have been employed by a carrier engaged in that commerce"?

(4) If the Federal Employers' Liability Act does apply did the railroad owe the employee a duty to provide a safe place to work even though the place of employment was on the premises of a third person?

STATEMENT.

We feel that much of petitioner's argument is based upon a view of the record which is not warranted after a jury verdict for the respondent plaintiff. For this reason we are restating the facts, and in the instances which we deem important are quoting the record directly.

(1) The plaintiff's employment record.

The plaintiff, Ove Ericksen, has been employed by Southern Pacific Company as a lumber inspector

since 1918. (R. 16.) In recent years he has worked out of Portland, Oregon. From Portland he traveled to the various locations where the inspections were to be made, such as, Seattle, Tacoma, and Longview, in the State of Washington, and Eugene, Roseburg and Central Point, in the State of Oregon. (R. 19.)

The chief lumber inspector for Southern Pacific Company was in Portland, Oregon, and it was this man who ordered the inspectors to various jobs. (R. 20.) A Mr. Campbell was the chief lumber inspector at the time of the injury complained of and it was he who ordered Mr. Ericksen to go to Central Point, Oregon. (R. 20.)

(2) The method of inspecting and loading ties at Cheney Lumber Company.

The accident occurred on the 17th day of June, 1947, at approximately 2:30 P.M. at Cheney Lumber Company in Central Point, Oregon. (R. 16-17.) Mr. Ericksen was at Central Point upon the orders of the chief lumber inspector for the purpose of inspecting railroad ties which had been, or were to be purchased, by Southern Pacific Company. (R. 42-43.) It was while inspecting these ties that Mr. Ericksen was injured. (R. 28.)

The ties were stacked on a loading dock owned by the Cheney Lumber Company. (R. 23-24.) The dock was approximately 150 to 200 feet long. (R. 21.) From the edge of the dock to the ground below was approximately 10 to 11 feet. (R. 21.) On the ground below adjacent to and parallel with the

edge of the dock were two railroad tracks owned by Southern Pacific Company. (R. 23-24.) On these tracks the company spotted cars so that the ties could be loaded and shipped. (R. 22.)

On the afternoon of June 17, 1947, at about 2:30 o'clock there was a pile of 150 to 200 ties stacked along the edge of the dock. (R. 73.) An individual tie is approximately seven inches by nine inches by eight feet. (R. 22-23.) The ties were piled about 15 feet high (R. 28) and the ends of the ties were flush with, or protruded slightly over the edge of the dock. (R. 28.)

We will quote the record directly to show the method used for inspecting ties:

(R. 41-42):

"Q. Mr. Ericksen, when you examined these ties, you examined them to see whether or not they are square or—on the ends, is that right?

A. I beg your pardon.

Q. You examine these ties to see whether or not they are rectangular on the ends, is that right?

A. Examine them for splits and rots and bit knots and——

Q. Bark?

A. ——and bark and stuff like that.

Q. And you examine each tie?

A. (Witness nods head.)

Q. Do you examine these ties when they are piled? Do you examine all the ends together?

A. We go to the end and examine probably forty or fifty ties; then we mark them with a piece of crayon, those what we reject, and the man in the car, he watches them and he tells us when he gets to those marked ties, and puts them out."

(R. 56):

"Q. You inspect them on all four sides, do you?

A. Yes.

Q. And both ends, and grade them and enter them in your tally book; now, when do you do that?

A. They have generally one man outside and one man in the car. The fellow outside, he will turn them over for you, and I will look at them and if it is a select tie, I will mark it in my tally book as select, and it is number 1. I will tally it as number 1.

Q. You look at each tie individually before it is loaded in the car?

A. That's right.

Q. Where do you usually stand when you are doing that inspection?

A. When we do that inspecting, after we look at those ends—we look at the ends toward the railroad track, then we go back in the driveway and we stay at the end of them, stand at the end of the ties, if the pile is low enough. If the dock is full of ties then you will have to get on top of those piles and inspect them, haven't got any other place to stay. You have to get on top of them, and they shove from the top of the pile into the car.

Q. Then you look at each tie, turn it over and look at both ends, before it is put in the car?

A. Correct."

(3) The safe way and notice to the defendant.

(R. 35-36):

"Q. Now, Mr. Ericksen, you have worked at the places you say, at Longview, Tacoma, Eugene and Seattle. Is there a custom there with respect to the inspection of lumber?

A. Yes.

Q. Do you know what that custom is?

A. Yes.

Q. What is that custom?

A. The biggest part of the mills keep the lumber away from the edge of the dock so you can step up and take a look at it.

Q. At these places do they have any carriers?

A. Yes, most places now have those lumber carriers and lift trucks which pick up the units and bring it up to the car and set it right in front of the car, which give you ample place to work around and inspect your lumber and also turn it and see every piece of it.

Q. Mr. Ericksen, you say Mr. S. P. Campbell is your immediate superior?

A. Yes.

Q. Have you ever discussed the condition of the platform at Central Point with him?

A. Yes.

Q. And where did you talk to him about it?

A. At the office in Portland.

Q. And about when?

A. Well, it's perhaps about, five, five weeks or so before I fell off, I came very near falling off one day, and when I come in to Portland we started to talk about the different mills and how they piled their lumber and so forth and so on, and I suggested that it wasn't—they didn't leave room enough down at Central Point."

(4) The accident.

The accident occurred on June 17, 1947, at about 2:30 P.M. when Mr. Ericksen was inspecting the end of the tie pile flush with the dock. Mr. Ericksen stood at the edge of the dock facing the pile. He held on to the pile with his right hand and standing on his right foot leaned out over the edge of the dock to inspect the ends of the ties. After completing his inspection he started to return to a normal position. As he placed his left foot down and while still off balance his foot slipped or turned on something. He fell off the dock to the ground below. (R. 29-30.)

(5) Interstate commerce.

"Q. Do you load any of those?

A. Well, we help once in awhile, turn a few over and help shove a few in once in awhile.

Q. When it comes to the turning over the ties, do you do that?

A. Some times, yes.

Q. Who directs the loading of the ties? Who determines which ties are to be loaded?

A. The inspectors.

Q. That is you. Can they load ties without your approval?

A. No." (R. 24.)

"Mr. Fried. Q. After the ties are loaded into each car, is the door closed?

A. Yes.

Q. Who closes the door?

A. The loaders generally close the door, but they are not sealed.

Q. Do you assist in the closing of the doors?

A. Yes." (R. 25-26.)

"Q. And these ties are shipped out of the state, are they?

A. I beg your pardon.

Q. Are these ties shipped out of the State of Oregon?

A. Well, yes, the biggest part of them are." (R. 26-27.)

"Q. Now, where are these ties generally shipped to?

A. Well, there is a big territory to cover. They are shipped some into Southern Pacific Railroad of Mexico; they shipped others back to Houston, Texas, and ship some down to St. Louis & Southwestern, and Pacific Electric, and Pacific Fruit Express." (R. 25.)

"Q. Now, do you know what use these ties are put that you load, what are they used for?

A. They are put in the railroad track.

Q. Well, can you state whether or not they are used, put in new tracks, or old tracks?

A. They are put in new tracks and they are also used for replacement; they take out the old, worn-out ties and put in new ties.

Q. Are some of these ties sent to the creosote plant in West Oakland?

A. Yes.

Q. Are all of them sent to creosote plants?

A. No.

Q. Which ties are not sent to creosote plants?

A. It all depends on how much of a hurry they are for their ties. If they are short of ties they will take them right from the loading dock and put them in the track without being treated.

Q. From what loading dock?

A. Well, from Cheney, from wherever they happen to have ordered all those ties.

Q. Let us see if we can clear it up a little for the jury. Let us take a tie, for example, that is not creosoted. What happens to that tie, step by step?

A. It is put into the load——

Q. First it is put into the box car?

A. That's right.

Q. Then where does it go?

A. It goes out to the road where they need it. It is shipped out." (R. 27.)

"Q. Where is it unloaded?

A. Along the railroad tracks.

Q. It is unloaded along the railroad tracks, and what is done with it at that point?

A. They put it in the track.

Q. Without being creosoted?

A. Yes.

Q. Some of these ties, I understood you to say, are used on the main line and some are used for switching tracks?

A. Yes.

Q. Now, Mr. Ericksen, is it necessary for you to inspect these ties on the dock before they are put into the car itself?

A. Yes, absolutely.

Q. And why is that?

A. Because that is the only way you could inspect them.

Q. Why couldn't you have them put the tie into the car and inspect it there?

A. No, because if you get in the car and they start and throw those ties in you are liable to get killed, because those ties hit the floor of the car and they bounce every place.

Q. Well, suppose they load it into the car and you found it was a reject tie, what would have to be done with it?

A. You would have to take it out." (R. 27-28.)

As a result of his fall Mr. Ericksen suffered a crushing fracture of the heelbone (os calcis). He was awarded a verdict of $18,000.00 by the jury from which defendant has appealed.

ARGUMENT.

Petitioner has raised four questions, which we will treat individually, in the order raised by petitioner, for the purpose of showing why the writ should not issue.

---

(1) EMPLOYEE WAS ENGAGED IN INTERSTATE COMMERCE WITHIN THE MEANING OF THE ACT.

Mr. Ericksen was, at the time of his injury, a lumber inspector. We take it as self-evident that his title is not determinative of his status under the Federal Employers' Liability Act. Looking at the record we

see that his inspection of ties was an integral part of the loading procedure which put these ties into cars destined for interstate points. Other cases brought under this act which have held an employee who loads cars with goods destined for interstate commerce to be within the act are:

Zenz v. Industrial Accident Commission, 176 Cal. 304, 168 Pac. 364;

Vaught v. East Tennessee & W. N. C. R. Co., 255 S.W. 595, 29 A.L.R. 1202;

Lehigh Valley R. Co. v. Huhen (1925), C.C.A. 2d, 10 Fed. 2d 78, cert. denied 270 U.S. 641.

All of these cases were decided before the 1939 amendment to the act.

Rainwater v. Chicago R. I. P. Ry. Co. (1945), 207 La. 681, 21 So. 2d 872, was decided after the amendment. In that case the employee of the railroad was loading its posts on a car to be taken for immediate use in the repair of track. The Court held that the employee would have been covered by the act prior to the 1939 amendment. We feel that the respondent here is in the same position.

In *Lehigh Valley R. Co. v. Huhen,* supra, the Court said:

> "Where the facts show the case may well have been within the statute, the initial burden is satisfied, and it is for the defendant to show the contrary."

As the petitioner has pointed out, the only evidence adduced, other than medical, was introduced by re-

spondent. The relationship of the ties to interstate commerce, their destination and intended use, would be peculiarly within the knowledge of petitioner. Yet nothing was said by the railroad.

Since the 1939 amendment numerous cases have been decided, similar in their fact situations, which bring respondent within the act. These have been collected in *Hall v. So. Pac. Co.*, 71 F. Supp. 21, and include

> "employees loading barrels of oil to be used in filling lanterns and oil cans used in oiling railroad engines and machines (Harris v. Missouri Pac. R. Co., 1944, 158 Kan. 679, 149 P. 2d 342); blacksmith's helper engaged in making locomotive parts (Trucco v. Erie R. Co., 1946, 353 Pa. 320, 45 A. 2d 20); trackman, employed in spreading cinder ballast in surfacing tracks (Agostino v. Pennsylvania R. Co., 1943, D.C.N.Y., 50 F. Supp. 726); employee of roundhouse, the facilities of which were used in housing and preparing locomotives (Zimmerman v. Scandrett, 1944, D.C.S.C. Wis. 57 F. Supp. 799); guard at a terminal (Albright v. Pennsylvania R. Co., 1944, 183 Md. 421, 37 A. 2d 870); section hand laying rails on roadbed to aid in raising interstate track (Missouri Pac. R. v. Fisher, 1944, 206 Ark. 705, 177 S.W. 2d 725); employee loading posts to be used in repairing roadway (Rainwater v. Chicago, R.I.P. Ry. Co., 1945, 207 La. 681, 21 So. 2d 872); employee whose duty it was to clean up the railroad's tracks used partly to carry interstate commerce (Piggue v. Baldwin, 1942, 154 Kan. 708, 121 P. 2d 183); railroad's emergency flood con-

trol worker, whose duty it was to fill sand bags and place them on a flat car which was to move over tracks used for movement in interstate commerce, the bags being placed along the tracks to protect them from existing flood waters (Skanks v. Union Pacific Railroad Co., 1942, 155 Kan. 584, 127 P. 2d 431); section laborer helping maintain and repair tracks used for interstate trains. (Prader v. Pennsylvania Ry. Co., 1943, 113 Ind. App. 518, 49 N.E. 2d 387, 389)."

A comparison of these cases with our own shows clearly that respondent falls within that class of cases which have been judicially determined to meet the requirements of the 1939 amendment to the Federal Employers' Liability Act.

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(2) RAILROAD WAS WITHIN THE ACT.

We have quoted the portion of the record having to do with interstate commerce. From it, we think the jury could fairly conclude that the Southern Pacific Company brought its cars, on its tracks, to a point adjacent to the Cheney Lumber Company dock. There they were, in a continuous operation, inspected and loaded, with ties, some of which were destined for immediate use in interstate track, others were going to Texas, California and Mexico.

There can be no doubt that it is the jury's function to draw the conclusions. *Tennant v. Peoria & P. U. Ry. Co.* (1944), 64 S. Ct. 409.

If the jury could fairly conclude as we have stated, then petitioner's second question, as it states it, is never raised.

We have heretofore cited cases in which the loading of goods destined for interstate shipment was held to be interstate commerce. Can there be any question but that the railroad meets the test of the *Shanks* case: that it was in interstate transportation or work so closely related to it as to be practically a part of it?

---

(3) THE TEST APPLIED BY THE SUPREME COURT OF CALIFORNIA WAS CORRECT.

The California Supreme Court said:

> "When the employee's duties are shown to have had the required effect on interstate commerce he is 'deemed' to have been employed by a carrier in that commerce."

The petitioner's objection to this test is that the railroad must be found to be engaged in commerce whereas the employee may further or affect such commerce.

That petitioner's position is untenable is immediately apparent from an examination of the United States Senate Report on the 1939 Amendment to the Federal Employers' Liability Act. This is printed in Appendix C in the petition.

The main purpose of that portion of the amendment which we now discuss was to do away with the

moment of injury test. The Congress clearly recognized the difficulties which this test placed upon employees trying to prove a case under the act. The Congress intended to alleviate the employee's burden in this respect.

Petitioner would now have us believe that Congress intended to do away with this test for the employee but apply it to the employer. The employee, says petitioner, need not prove he was in interstate commerce at the moment of injury but he must prove that the employer was.

Congress could hardly intend to remove one difficulty and substitute the same one in different words.

---

(4) NEGLIGENCE.

The railroad owes a duty to its employees to provide them with a safe place to work.

Bailey v. Central Vermont R.R., 319 U.S. 350, 63 S. Ct. 1062.

This duty is owed even though the premises where plaintiff was sent did not belong to and were not under the control of the defendant.

Terminal R. Ass'n of St. Louis v. Fitzjohn (1948), 165 F. 2d 473;

Porter v. Terminal R. Ass'n of St. Louis, 327 Ill. App. 645, 65 N.E. 2d 31.

Every Court before whom this case has appeared has agreed that this duty exists. The dissenting jus-

tices of the California Supreme Court do not disagree with the *Fitzjohn* case. They attempt to distinguish it.

The respondent came within the act as it was before 1939. There is no doubt that if the employee met the test of the *Shanks* case (*Shanks v. Delaware, etc. R. Co.*, 239 U.S. 556), the employer must likewise meet it.

We have quoted the record showing wherein the duty was breached. There is ample evidence to sustain a jury verdict.

Wilkerson v. McCarthy, 336 U.S. 53, 93 L.Ed. 497.

CONCLUSION.

For the foregoing reasons it is prayed that the petition for certiorari be denied.

Dated, San Francisco, California,
November 21, 1952.

Respectfully submitted,
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Attorneys for Respondent Ove E. Ericksen.

WILLIAM P. CALLAHAN,
Of Counsel.

(Appendix A Follows.)

Appendix A

45 U.S.C. § 51: Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

TABLE OF AUTHORITIES

Cases	Pages
Bay v. Merrill etc. Co., 243 US 40, 61 L ed. 580	3
Lehigh V. R. Co. v. Huhen, 10 F2d 78 (Circ. 2)	2, 3
McCluskey v. Marysville & N. Ry. Co., 243 US 36, 61 L ed 578	3
Pedersen v. Delaware etc. R. Co., 229 US 146, 57 L ed. 1125	3
Rainwater v. Chicago R. I. P. Ry. Co., 207 La. 681, 21 So. 2d 872	3
Santa Fe etc. Ry. Co. v. Grant Bros. Const. Co., 228 US 177, 75 L ed. 787	2
Treasurer of Indiana v. Wood Preserving Corp., 313 US 62, 85 L ed. 1188	4
Vaught v. East Tennessee etc. Co., 128 Tenn. 349, 255 SW 595	2
Zenz v. I.A.C., 176 Cal. 304, 168 Pac. 364	2

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 418

SOUTHERN PACIFIC COMPANY,
a corporation,
Petitioner,

vs.

OVE E. ERICKSEN.

Petitioner's Reply Brief on Petition for Certiorari

Only one matter in respondent's brief in opposition to our petition for a writ of certiorari calls for comment.

The point is made that the inspection of the ties was an integral part of the loading procedure which put the ties into cars destined for interstate points. [It is not. Loading was done by the vendor, Cheney Company. But we pass this and for the moment assume it is part of loading.] It is then said that loading goods for interstate commerce is activity within the Federal Employers' Liability Act. This overlooks the fact that when petitioner purchased ties, had them put

in its own cars and then carried them to various points for such use as might later be determined **it was not acting as a common carrier.**

The three cases cited by respondent are readily distinguishable. In *Zenz v. I. A. C.*, 176 Cal. 304, 168 Pac. 364, the deceased was handling United States mail. It did not belong to the railroad. The railroad was carrying it for hire. In *Vaught v. East Tennessee etc. Co.*, 128 Tenn. 349, 255 SW 595, Vaught was a truck-handler injured while he was loading revenue shipments on to an interstate train. In *Lehigh V. R. Co. v. Huhen*, 10 F2d 78 (Circ. 2), the deceased was a baggagemaster "and at the time of the accident was in the performance of his duties in a baggage car of a passenger train". The holding was that the evidence was sufficient to warrant an inference that the train was an interstate train because it was carrying interstate mail.

But a railroad is not acting as a common carrier in carrying materials to be used in the construction or maintenance of its line.

The precise point is ruled by *Santa Fe etc. Ry. Co. v. Grant Bros. Const. Co.*, 228 U.S. 177, 186-188, 75 L ed. 787, 792, 793. The railroad entered into a contract with a construction company to have construction work done. As part of the agreement the railroad undertook to haul materials and in the contract there was a provision limiting its liability. The validity of this provision turned upon whether the railroad was acting as a common carrier. If it were the provision was not enforceable. If it were not, the provision restricted its liability. It was held that the railroad was not acting as a common carrier:

> "In constructing, improving, or repairing its road, and in building its extensions and branches, the rail-

road company is providing facilities for its service as a common carrier, but, of course, is not acting as such. It may do the work itself, if it chooses, or it may make it the subject of contract with another. In the latter case it simply employs an appropriate agency. The haulage by the railroad company of the men, appliances, and supplies, required by the contractor for the purpose of the construction or improvement, to or from the point on its line where the work is to be done, is merely incidental to the work itself. * * * It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duties as a common carrier, * * *."

Compare *McCluskey v. Marysville & N. Ry. Co.*, 243 US 36, 61 L. ed. 578 and *Bay v. Merrill etc. Co.*, 243 US 40, 61 L ed. 580.

With respect to the ties the railroad would not be acting as a common carrier until the ties were put under the rails and a revenue train passed over the rails. Taking designated ties for a specific and designated use in the repair of the highway of commerce is close enough to the business of common carriage by rail to be a part of it. It is not their carriage that makes the railroad a common carrier but their dedication to repair of the highway of commerce. This is extent to which *Rainwater v. Chicago R. I. P. Ry. Co.*, 207 La. 681, 21 S. 2d 872 goes. It goes no further than *Pedersen v. Delaware etc. R. Co.*, 229 US 146, 57 L ed. 1125 where materials to be used in repair of a bridge were being taken to the bridge. But this handling of specific materials already committed to specific use in the repair of facilities committed to interstate common carriage by rail is a far

cry from inspecting lumber at the plant of the railroad's vendor in the course of acquisition of ties by the railroad for general, future and undesignated use. If a railroad, transporting its own materials over its own line for construction, improvement or repair, is not acting as a common carrier by railroad, certainly it is not acting as a common carrier by railroad in the more remote activity of purchasing supplies. The fact that at a future and as yet undetermined time they will be put to some use (as yet not fixed) does not come close enough to transportation to bring the carrier or its inspector under the Act, unless all employees of a railroad are under the Act and they are not. We again respectfully call attention to *Treasurer of Indiana v. Wood Preserving Corp.*, 313 US 62, 85 L ed. 1188 and the cases cited in note 50 of the petition.

It is respectfully submitted that the petition should be granted.

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